CORRECTED COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. [redacted] 7

THE WANDERER

WILBURN BOAT COMPANY, et al.,

Petitioners-Appellants Below,

vs.

FIREMAN'S FUND INSURANCE COMPANY,

Respondent-Appellee Below.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT

We are unable to accept Petitioners' statement of the case.

At the trial Petitioners stipulated that they broke this insurance contract in numerous ways; broke it, moreover, in respect of matters as to which the contract provided in downright terms that a breach rendered the policy void.

In view of their numerous stipulated breaches Petitioners were barred from recovery under any law—whether the

law of Illinois where the contract was made and delivered, or the law of Texas which they do not state correctly, or the law of Oklahoma where the owner of the vessel resided at the time of the loss and where the loss occurred, or the general maritime law with reference to which this contract was obviously made—and necessarily made, since this Court and the other Federal Courts have held many times in a long line of unbroken decisions that the general maritime law must govern this typical maritime contract of marine insurance on the hull of a navigating vessel.

Following the decisions last referred to, the Court of Appeals said: "Therefore the state law is inapplicable whatever it may be and we need not and do not decide whether, as appellee vigorously and persuasively insists, the Texas statutes as construed by the Texas courts have no application to the present situation."

The way Petitioners seek to take advantage of this entirely correct statement is illustrated by their treatment of their breach of the policy in selling their owners' interest in the insured vessel.

The policy provision is, that sale of the assured interest rendered the insurance void; the stipulated fact is that the individuals to whom the policy ran did sell the vessel—to an Oklahoma corporation for $9000.00 (R. 77); the concurrent findings of the District Court and the Court of Appeals are that this was a breach of the policy. (R. 33, 281.)

There is no state law outlawing policy conditions against sale of assureds' interest in the property. But Petitioners seek to brush this aside with the remark (Petition, p. 8) that "The question of whether this transfer of the vessel constitutes a breach of warranty is not presented to this Court because it involves points of law not ruled on by the Lower Courts." The point of law argued by Peti-

tioners to the "Lower Courts" in connection with this stipulated breach is that a Texas statute (quoted in their Petition at page 8) says that no breach shall be a defense that does not contribute to the loss, and the sale did not of itself contribute to the loss. Of course there is an entire absence of any tenable theory that would make Texas law (rather than Illinois or Oklahoma law—to say nothing of general maritime law) govern the validity and effect of the terms of this contract. But beyond that, the Texas statute so referred to has been construed by the Texas courts to have no application whatever to policy terms of this nature, whose breach *could* not of itself contribute to the destruction of the property by fire.*

For that very reason, the Texas courts hold that when the Texas Legislature forbade defense on the basis of a provision whose breach did not contribute to the loss, it did not have in contemplation such provisions as this, whose breach could not of itself contribute to the loss. This distinction is illustrated by the case of *Home Insurance Co. of New York* v. *Henderson*, 263 S. W. 650 (Tex. Civ. App.), where the insured purchased a car, paying half the price in cash, and signed 10 notes for the balance. He took out a fire policy with the insurer, providing if any note was not paid within ten days after maturity, the fire policy was null and void. At the time the car was destroyed by fire, two of the notes were over a month due. The Texas statute similar to the present Article 4930 (Texas Ins. Code, 1951, Sec. 6.14) was relied on by the insured when the insurer defended on the policy provision. The Court said:

> "It is believed that Article 4874A [the present Article 4930] does not have application to the provision in the suit, since the subject-matter of such stipulation, from its very nature could not *of itself* contribute to

* The provision goes to moral risk (White Dep. 10) like the provision against pledging the vessel. (See *Sun Insurance Office* v. *Scott*, 284 U. S. 177.)

> bring about the destruction of the property by fire. As frequently held, Article 4874A has reference only to those warranties and provisions, the breach of which might contribute to or bring about a fire loss, and has no application to provisions, the violation of which could not from their very nature, contribute to or bring about the destruction of property by fire." (Our emphasis) *Ibid*, 652

This ruling has been followed many times in construing this statute and is a well developed distinction to which the Texas courts adhere. (See 24 Texas Jurisprudence 906.) Among the many instances where it has been held that the statute does not apply are: requirements of keeping records in an iron safe, *Commonwealth Ins. Co.* v. *Finegold* (Tex. Civ. App.), 183 S. W. 833; clause prohibiting concurrent or additional insurance, *Boatner* v. *Providence-Washington Ins. Co.* (Tex. Com. App.), 241 S. W. 136; requirement that the insured be the sole and unconditional *owner* of the property, *National Fire Ins. Co.* v. *Carter* (Tex. Com. App.), 237 S. W. 1089; provision requiring insured to submit to examination after the fire loss, *Humphrey* v. *National Fire Ins. Co.* (Tex. Com. App.), 231 S. W. 750; and requirement of the insured to submit a notary's statement as proof of loss, *Springfield Fire and M. Ins. Co.* v. *Nelms*, 184 S. W. 1094 (Tex. Civ. App.).

Accordingly, the Texas statute on which Petitioners rely, as construed by the Texas courts, leaves the policy provision against sale in full force and effect, and its stipulated breach is a complete defense, even *under the Texas law.*

This is only one example. Full appreciation of the effect of Petitioners' stipulated violations of their contract requires full and accurate statement of the case, which follows. Full and correct statement of the case also solves the only suggestion ultimately raised here by this Petition, involving choice of applicable law, a matter that the Petition treats upon an incorrect and misleading statement of

the case and of the authorities, and which appears to be a singularly barren inquiry in any event since the judgment of dismissal was necessary under any law that might be thought to apply.

This suit was brought on a policy of insurance on a pleasure yacht named "The Wanderer." (Plaintiff's Exh. 1; White Dep. 7, 9, 14.)[1] She was 65 feet in overall length and 17 feet in the beam. (R. 72.)

The policy, No. YA 28579, had been issued in Chicago, Illinois, by defendant Fireman's Fund Insurance Company naming the then owners, Messrs. Marshall and Shuler, of Rock Island, Illinois, as assured. (R. 233-254.) H. H. Cleaveland Agency, an Illinois brokerage house of Rock Island, Illinois, had secured this policy for Marshall and Shuler from defendant, the insurer or underwriter therein. (H. H. Cleaveland Agency was not an insurer or underwriter.) (White Dep., 11.)

On June 9, 1948, while the vessel lay in the harbor at Greenville, Mississippi, under a port risk endorsement[2] she was purchased from Marshall and Shuler by three individuals, J. F. Wilburn (Frank Wilburn), J. H. Wilburn (Henry Wilburn) and L. G. Wilburn (Glen Wilburn). (R. 43, 70, 92.) They "elected" one McKinney of Denison, Texas, to secure insurance on the vessel for them. (R. 105, 118.) It was the Wilburns who asked him to get insurance, not vice versa. (R. 106.) McKinney had no facilities for procuring vessel insurance. (White Dep. 4.) He telephoned

[1] The *depositions* will be thus referred to herein. They were before the Court of Appeals in specie, and we have caused them, pursuant to stipulation on file herein, to be filed here. See R. 157-171 for rulings on objections to portions of the depositions. No question of the correctness of these rulings was raised by Petitioners in the Court of Appeals, and none is brought forward here.

[2] Port risk endorsement: See R. 243-244, and *Robinson* v. *Home Ins. Co.*, 73 F. (2d) 3 (CCA 5, 1934); cert. den. 294 U. S. 712.

H. H. Cleaveland Agency in Rock Island, Illinois, asking it to contact the insurance carrier (the defendant) to continue the existing insurance for the new owners, stating that this yacht would make a voyage from Greenville, Mississippi, to Lake Texoma via the Mississippi and Red Rivers and thereafter be used on Lake Texoma, requiring coverage of navigating perils. (White Dep. 4; Rossow Dep. 6.)[3] H. H. Cleaveland Agency of Rock Island, Illinois, then communicated with this defendant at its office in Chicago, Illinois, by telephone, mail, and personal visit, conveying to defendant the above oral application, which defendant at said Chicago office accepted (R. 226; White Dep. 13, Rossow Dep. 6) and bound the risk. (See *Insurance Co.* v. *Midwest Transfer Co. of Illinois*, 178 F.(2d) 191 (CA 7, 1949).) Defendant then prepared the necessary endorsement for the policy at its office in Chicago, Illinois (R. 226; White Dep. 13, Rossow Dep. 6) and, in Chicago, mailed the same to H. H. Cleaveland Agency in Rock Island, Illinois, which countersigned it (R. 232) as issuing agent (R. 254) and then mailed the same to McKinney. (Rossow Dep. Exh. 7.) H. H. Cleaveland Agency of Rock Island, Illinois, also mailed to McKinney the original policy, No. YA 28579, to which said endorsement appertained. (Rossow Dep. Exh. 9.)

All subsequent endorsements followed the same course.

On December 14, 1948, Petitioners, through McKinney and H. H. Cleaveland Agency solicited an endorsement increasing the coverage from its original amount of $10,000.00 by $30,000.00, to a total of $40,000.00, upon McKinney's representation by letter to Cleaveland in Rock Island, read over the telephone by it to defendant in Chicago (Dep. Rossow 29-30, Ex. 23) that "insured has an investment of $40,000 in this yacht at the present time."

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[3] He also stated that it would be "locked" through the Denison Dam. (White Dep. 4, Rossow Dep. Exh. 2.)

(Dep. Rossow 29-30.)[4] Again there was no mention that the yacht was being used for commercial purposes or mortgaged and none that it had been sold to a corporation. (Dep. Rossow 43.)[5] Cleaveland from Rock Island called defendant in Chicago and, reading to defendant McKinney's letter stating that assured had an investment of $40,000 in the vessel, secured thereby defendant's oral binder of the increased amount on December 20, 1948, which defendant confirmed to H. H. Cleaveland Agency in writing on December 28, 1948. (Dep. Rossow 30, Ex. 29.) Pursuant thereto on December 20, 1948 defendant in Chicago, Illinois, had prepared an endorsement for the policy increasing the amount of insurance under the policy to $40,000 and on January 18 mailed it to Cleaveland, which in turn mailed it to McKinney. (R. 299, Dep. Rossow, Exs. 32, 33.)

Thus this contract (maritime or not) was completed and issued in Illinois, and the written evidence of the contract was delivered when it was put in the mails in Illinois. (See *Wenz* v. *Business Men's Accident Assn.*, 212 Ill. App. 581, 584; *Fidelity Mutual Life Assn.* v. *Harris*, 94 Texas 25, 35;

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[4] This representation is now admitted to have been false. (Cf. *infra.*) Petitioners are bound by the false representations of their broker; *Eagle Star, etc.*, v. *Tadlock*, 22 F. Supp. 545 (S.D. Cal. 1938) on 548, collects authorities. For repetition of this false statement by assureds, cf. *infra.*

[5] It does not appear that even McKinney knew of the mortgages. This policy makes either concealment or misrepresentation a fatal breach; these are separate conditions. *Imperial Fire Ins. Co.* v. *Coos County*, 151 U. S. 452.

57 S. W. 635, 638; *Jackson* v. *New York Life Ins. Co.*, 7 F. (2d) 31, 32 (CA 9, 1929) and cas. cit.)[6]

Plaintiffs alleged flatly in the pleadings on which the case was tried that they had "duly complied with all the provisions of said policy" etc. (R. 9.)

Defendant denied this, specifying provisions breached. (R. 22-30.)

There were pretrial proceedings. (R. 118.)

At the commencement of the trial plaintiffs' counsel was asked if he desired to make an opening statement, and replied that "The pleadings speak for themselves so far as we are concerned." (R. 86.)

Plaintiffs went to trial on the simple issue of their performance *vel non*. (Complaint, R. 8, et seq.; Answer, R. 22,

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[6] "The general rule is that the acceptance of the application and the issuance and mailing of the policy are all the acts that are essential to put the contract in force, and the fact that the policy is sent to an agent for unconditional delivery does not alter the effect of the transaction. *Shattuck* v. *Insurance Co.*, 4 Cliff. 598, Fed. Cas. No. 12,715."

Fidelity Mutual Life Assn. v. *Harris*, 94 Texas 25, 57 S. W. 635, 639.

"A policy of insurance is delivered to insured when it is deposited in the mails," etc.

Jackson v. *New York Life Ins. Co.*, 7 F. (2d) 31, 32, (CA 9, 1925.)

"If the insurer in such a case does not contemplate any further action than the delivery of the policy by the agent, then the delivery becomes effective as soon as the policy is mailed." (Cit. auth.)

Wenz v. *Business Men's Accident Assn. of America*, 212 Ill. App. 581, 583-584.

There is no argument that the law of Illinois would condone plaintiff's admitted breaches, nor would it; *vide infra*.

Contrary to the impression that the Petition labors to convey, it is apparent that defendant never solicited this policy, but that the Wilburns sought out this defendant on the marine insurance market in Chicago, themselves soliciting there a policy of marine insurance on the vessel they had bought in Mississippi.

et seq.) That is the issue here. Before the Court of Appeals Petitioners made an argument of waiver as to one, only, of the numerous breaches of the contract, which the Court of Appeals decided against them (R. 281) and they do not raise the question here.

At the trial Petitioners *stipulated* that they had breached provisions of the policy pointed out in the answer (R. 40, et seq.).

This insurance contract expressly provides:

> "WARRANTED by the assured that the within named vessel shall be used *solely* for private pleasure purposes during the currency of this policy and shall not be hired or chartered *unless permission is granted by indorsement hereon.*" (Our emphasis) (R. 236.)

Petitioners stipulated (R. 40-41):

> "It is stipulated between the parties that the Boat Wanderer was not used solely for private pleasure purposes during its ownership from time to time by the several plaintiffs herein, but on the contrary said boat was purchased with the intention of being chartered and used for hire, was remodeled and reequipped for such purposes, and to the extent that patronage was available, was chartered and used for hire from the time of its acquisition by J. F., J. H., and L. G. Wilburn until it sank as the result of being burned by fire on February 25, 1949. During January, 1949, the boat was damaged as the result of a storm. It was taken from its regular mooring at Burns Run Resort to Lake Texoma Boat and Dock Company for repairs and remained at Lake Texoma Boat and Dock Company undergoing repairs until three or four days before February 25, 1949, at which time it was returned to its regular mooring at Burns Run Resort. After being so returned to Burns Run Resort the boat was not thereafter used for any purpose until it sank as the result of being burned by fire on February 25, 1949."

The insurance contract further expressly provides (R. 241):

> "It is Also Agreed that this insurance shall be void in case this Policy or the interest insured thereby shall be *sold*, assigned, transferred or *pledged* without *the previous consent in writing of the Assurers.*" (Our emphasis)

Petitioners *stipulated* at the trial that the Wilburn Brothers sold "The Wanderer" to an Oklahoma corporation on September 24, 1948 for $9,000.00. (R. 43, 76.) No previous consent, no written consent, and no consent whatever, was asked or given to this sale. There is no such argument.

The names of these assureds were first given by McKinney as Frank and Henry Wilburn d/b/a Wilburn Bros. and the endorsement of July 9, 1948, so reads. (R. 231.) This was finally changed at McKinney's request, made to Cleaveland, and by Cleaveland relayed to defendant (as before) to Glen. Frank and Henry Wilburn, d/b/a Wilburn's Boat Company, the date of the final endorsement being August 6, 1948. (R. 227.) These persons then owned the vessel, and J. F. Wilburn testified that *he knew* that this was in favor of the partners, not of any corporation. (R. 125-126.) The last endorsement was August 6, 1948 and they did not sell the vessel to the corporation until September 24, 1948. (R. 76-82.) No endorsement to the corporation was asked for or given; there is no such argument.

The Oklahoma corporation to which the Wilburns sold the vessel joins as a plaintiff. *Defendant never contracted with it.*

Apparently realizing that the situation precluded recovery the author of the complaint alleged that an endorsement in favor of the corporation was requested but by mistake was issued to Glenn, Frank and Henry Wilburn d/b/a Wilburn's Boat Company. (R. 9.) Petitioners made no attempt to prove this averment. It is rejected by the lower

courts' finding, that the sale to the corporation was a violation of the policy.[7]

A unilateral mistake would call for rescission. There is nothing on which to found any argument of *mutual* mistake (which would require the plainest proof—some authorities say, proof beyond a reasonable doubt) and again there is no such argument. The averment of request for an endorsement to the corporation was abandoned at the trial as it is here, but it is worth mentioning as showing the realization of even the author of the complaint that, on the real facts, he could not state a cause of action on this policy. It is the law in Texas, as everywhere else, that a contract of insurance is personal to the assured named therein; it is not a contract *in rem*. *St. Paul Fire & Marine Ins. Co.* v. *Culwell*, 62 S. W. 2d 100, 101 (Tex. Com. App.). The fact is that these individuals took a policy stipulating that it should be void if the vessel was sold, and it was sold. The concurrent courts below so found, and also that this was a violation of the policy as above quoted. The only issue tendered was performance *vel non*.

The last-quoted provision of the policy is not only that the policy shall be void if the vessel is sold, but also it shall be void if the vessel is pledged. (R. 41-43.) Following the pre-trial proceedings, Petitioners further *stipulated* at the trial (R. 41-43):

> "It is further stipulated by the parties that on June 3, 1948, the plaintiffs, J. F., J. H., and L. G. Wilburn, borrowed $10,000.00 from the Citizens National Bank of Denison, Grayson County, Texas, executing their negotiable promissory note in favor of said bank.

[7] In connection with this averment it is interesting to note that when plaintiffs presented the policy in evidence, they had attached on it *two* endorsements dated August 6, 1948, both running to the individuals, one of them unexecuted (R. 226-227). Plaintiffs got the second of these two endorsements when their agent McKinney *after the loss*, wrote H. H. Cleaveland Agency for a copy of the endorsement running to the individuals (Dep. Rossow Ex. 13).

Thereafter, on August 4, 1948, Wilburn Bros. Boat Company, acting by J. F. Wilburn and J. H. Wilburn borrowed an additional $10,000.00 from said bank, executing their negotiable 90-day promissory note therefor, being Exhibit 1 attached to this stipulation.

"The boat involved in this case, the Wanderer, was pledged to said bank by said Wilburn Bros. Boat Company, acting as aforesaid, by chattel mortgage of August 4, 1948, being Exhibit 2 attached to this stipulation.

"On October 4, 1948, a negotiable 90-day promissory note for $10,000.00 was given to said bank, signed 'Wilburn Boat, Inc.' by J. H. Wilburn, being in renewal and extension of the above mentioned note of August 4, 1948. Said note of October 4, 1948, is Exhibit 3 attached to this stipulation.

"On October 21, 1948, the boat was pledged to said bank by chattel mortgage of said date, signed 'Wilburn Bros. Boat Company, a Corporation, by L. G. Wilburn, President, J. F. Wilburn, Secretary', such chattel mortgage being Exhibit 4 of this stipulation.

"On October 25, 1948, 'Wilburn Bros. Boat Company, a Corporation' acting by L. G. Wilburn, President and J. F. Wilburn, Secretary, executed a negotiable one year promissory note in favor of J. F. Wilburn and J. H. Wilburn for $8,000.00, being Exhibit 5 attached to this stipulation.

"On the same date 'Wilburn Bros. Boat Company, a Corporation', acting as aforesaid, pledged said boat to said J. F. Wilburn and J. H. Wilburn by chattel mortgage of said date, being Exhibit 6 attached to this stipulation.

"The indebtedness of $20,000.00 to said bank and of $8,000.00 to J. F. Wilburn and J. H. Wilburn, above mentioned, were unpaid at the time the boat sank as a result of being burned by fire on Febraary 25, 1949, and the chattel mortgages above mentioned had not been released at said time but were in full force and effect.

"The indebtedness and pledges hereinabove mentioned were created and made without the consent of the defendant.

"On May 12, 1949, the defendant Fireman's Fund Insurance Company tendered to Glen, Franklin and Henry Wilburn, DBA Wilburn Boat Company, Denison, all premiums paid to the defendant under the policy involved in this case from the time that the boat Wanderer was purchased by said J. F., J. H., and L. G. Wilburn. This tender was refused on May 19, 1949, without objection to the form or sufficiency of the tender.

"It is further stipulated that the plaintiff, Wilburn Boat Company, an Oklahoma Corporation, has never had and does not now have a permit to do business in the State of Texas."

Yet another provision of the policy states (R. 241):

"This Entire Policy Shall Be Void if the Assured has concealed or misrepresented any material fact or circumstance concerning this insurance or the subject thereof, or, in case of fraud or false swearing by the Assured touching any matter relating to this insurance or the subject thereof; whether before or after a loss."

Before the Court of Appeals Petitioners in their brief frankly admit that the representation of a $40,000 investment in the vessel was untrue.[8] They argued that a Texas statute (Vernon's Texas Statutes, 5050) made all misrepresentations immaterial that were not in a writing attached to the policy. But that statute by its express terms applies only to policies "contracted for or issued" in Texas, and on the actual fact, *supra*, namely, that this policy was issued and contracted for in Illinois, the Texas statute was itself irrelevant.

In this connection reference is made to what already has been said. It may be added that the defendant, which in-

[8] As Petitioners put it in their brief to the Court of Appeals: "By reason of a 25% error in a guess as to the cost price of a converted vessel appellee urges that the policy be forfeited on the grounds of misrepresentation." (Petitioner's C. A. Brief, P. 31) This judicial admission makes it unnecessary to wade through the accounting at the trial, which would show, we think, that the misrepresentation was even more extreme than plaintiffs admit.

creased the amount of this coverage from $30,000.00 to $40,000.00 (Dep. Rossow 30; R. 229, 230) solely on the admittedly false representation that assured now had an investment in the vessel of that larger sum (*vide supra*) then asked for a survey (Rossow Dep. Exh. 29) in which (R. 260) the following information was particularly asked for as "necessary":

"Cost of vessel to present owner:" to which assured replied: "$30,000 plus $10,000 for engine, lighting and fire fighting equip." (R. 261.) Whether this renewal of the original false representation that assured had $40,000 invested in the vessel came to the insurer's attention before or after the loss is not material to the question whether it was a further breach of the policy, which makes any misrepresentations *or concealments* "whether before or after loss" a breach voiding the policy, as above quoted.

In the same connection the insurer asked for "Particulars of any mortgage or other encumbrance" to which J. F. Wilburn for the partnership consisting of himself and the other two Wilburn Brothers answered: "None." (R. 261.) It is now stipulated that in fact the vessel was then pledged for $20,000 to a bank, and for $8,000 by the corporate owner to two of its shareholders. (See Stipulation, quoted above.)

The policy repeats again and again, as the provisions quoted make plain, that the assurer consents to be bound for the premium charged only on the terms expressed in the policy, and no other, expressly making compliance by the Assured with the terms of the Policy condition precedent to the right of recovery, as follows:

> "No Suit or Action on this policy for the recovery of any claim hereunder shall be sustainable in any Court of Law or Equity unless the Assured shall have fully complied with all of the foregoing requirements, etc. (R. 241.)

> 'This Policy is made and accepted subject to the foregoing stipulations and conditions and to the conditions printed on the back hereof, which are hereby specially referred to and made part of this Policy, together with such other provisions, agreements, or conditions as may be indorsed hereon or added hereto; and no officer, agent or other representative of this Company shall have power to waive or be deemed to have waived any provision or condition of this Policy unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this Policy exist or be claimed by the Assured unless so written or attached.' " (R. 235.)

The policy covers a vessel in several states, first on a voyage from Greenville, Mississippi, via the Mississippi and Red Rivers, and then on Lake Texoma, which lies in two states (R. 119-120; 152-153) as its name implies, the principal navigable portion of the lake being in Oklahoma. (R. 1-4.) At the trial plaintiffs disputed that Lake Texoma was "navigable waters of the United States" but the lower court found as a fact that it is. (R. 33.) Petitioners did not challenge that finding in the Court of Appeals (R. 279-280), the Court of Appeals expressly concurred therein (R. 280), and Petitioners do not bring the question forward here.[9]

Now disputing the navigable character of the waters, Petitioners complain, however, that a test of *locale* was applied

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[9] The Court of Appeals referred also (R. 280) to evidence supporting the finding; see cross-examination of plaintiffs' witnesses, J. H. Keersing, R. 146-155 and J. F. Wilburn, R. 119-126. (See also *U. S. v. Appalachian Power Co.*, 311 U. S. 377, especially pp. 408, 409 and cas. cit., and *Davis v. United States*, 185 F. (2d) 938 (CA 9, 1950) so holding as to Lake Tahoe, which is on an inaccessible mountain top, but lies in two states; and, among other authorities referred to by the Court of Appeals, the decision of this Court in *Insurance Co. v. Dunham* (78 U. S. 1, 25), where this Court held that the maritime law extends "to all navigable waters of the United States, whether land-locked or open, salt or fresh, tide or no tide.")

below to determine the maritime character of this contract. (Petition, p. 9.)

The complaint is groundless.

Among the outstanding characteristics of *the nature of this contract* is that it insured a navigating vessel on navigable waters of the United States expressly named therein in several states.

Besides its subject, history and purpose, the nature of this contract, further appearing from its form and terms, is that of a typical maritime contract of marine hull insurance, with provisions whose meaning and effect has been settled by a long course of decisions under the general maritime law, from its "perils of the seas" clause to its "general average" clause, as hereinafter more particularly detailed. (Cf. *infra.*) It is plain on the face of the document that this is a maritime instrument made with reference to the maritime law. When Petitioners were before the Court of Appeals they expressly conceded that it was a contract of marine insurance, as the Court of Appeals points out. (R. 279.)

The fact so established has its significance, together with the coverage of the vessel by the policy for navigation in numerous states, and with the history and terms of the contract, in connection with the further fact that, like all contracts of marine insurance, this is a maritime contract, whose validity and effect the Constitution requires to be governed by a uniform national law, to-wit, the general maritime law; and not by 48 different sets of laws; and the consequent incapacity of state legislatures to destroy the uniformity intended by Constitution—or of Congress to give them permission so to violate the Constitution.

The vessel performed the voyage from Greenville, Mississippi, to Lake Texoma via the Mississippi and Red Rivers, and was skidded[19] over the dam into Lake Texoma where

[19] See *U. S.* v. *Appalachian Power Co.*, 311 U. S. 371, 409.

her regular berth was at Burns Run Resort, in Oklahoma. (R. 97, 106, 119, 120.) She made voyages from this berth, and return thereto, sometimes crossing the Oklahoma-Texas line in doing so. (R. 9.) She was on the Texas side for the temporary purpose of repairs from time to time. (R. 106, 144, 153.) After the Petitioners had encumbered the vessel for $20,000.00, and the bank had refused to loan any more money on it (R. 125), after they then had further encumbered the vessel for $8,000.00 more to two of the Wilburns, and while she was unemployed and apparently deserted, she was burned by fire and sank (R. 40-41) in the small hours one night, near her ordinary berth but a little further offshore. (R. 119, 120.) It was in Oklahoma that she burned and sank. (R. 97.)

The policy is endorsed: "Yacht Policy No. YA 28579 Fireman's Fund Insurance Company, San Francisco, California, Western Marine Department, Insurance Exchange Building, 175 West Jackson Boulevard, Chicago 4, Ill." (R. 254.) It recites that it is "not valid unless countersigned" by a duly authorized agent of the company. (R. 254.) It is "countersigned at Rock Island, Illinois" by H. H. Cleaveland Agency (R. 254) of that city (White Dep. 3) to which company of Rock Island, Illinois, all endorsements were sent (Dep. Rossow *passim*) for such signature. (R. 226-254.) The policy mentions three offices of the company: New York, San Francisco, and Chicago. (R. 252, 255.) Losses are to be reported "to the nearest office of this Company or to the Agent who shall have issued this Policy" which localizes important performance outside of Texas, and, with the fact that the contract was made in Illinois (*vide supra*) excludes the law of Texas under this Court's decisions upon the effect of the due process clause of the XIVth Amendment to the Federal Constitution (*Hartford Indemnity Co.* v. *Delta Co.*, 292 U. S. 143, 149-150) and, incidentally, under the rule of conflicts observed in Texas.

(*Fidelity Mutual Life Ass'n.* v. *Harris*, 94 Texas 25, 35; 57 S. W. 635, 638.)[11]

Demand for payment on this policy was made by letters and proof of loss enclosed to the H. H. Cleaveland Agency, addressed to it and Defendant (and, curiosly, to Petitioner's man McKinney) (R. 142; Rossow Dep. Ex. 49) and rejected by letter from Defendant's Chicago office which Petitioners put in evidence without limitation as their Exhibit 2. (R. 255-260.)

Petitioners having stipulated and admitted that they broke this contract again and again, seek to find a law that would permit them to violate their agreement and still recover on it. There is no argument that the general maritime law would allow that, or the law of Illinois where the contract was made, or the law of Oklahoma where the vessel was lost and the then owner of the vessel resided.[12] Petitioners' position appears to be confined to the propositions that (1) Texas has made laws whereby they were free to break their contract and still recover on it; (2) Texas laws govern the validity and effect of the terms of this contract.

We believe both propositions to be mistaken.

That the interpretation and effect of the provisions of maritime contracts, of which the contract of marine insurance is one of the most important, is governed under our Constitution by the general maritime law, is settled by many decisions in this Court and the lower Federal Courts.

[11] Since the loss here did not occur in Texas, and the warranty of only pleasure use of the vessel called for performance in whatsoever state she might be, the present situation bears a strong *a fortiori* to *Hartford Ins. Co.* v. *Delta Co.*, 292 U. S. 143, *supra*.

[12] See *Brown* v. *Connecticut Fire Ins. Co.*, 153 Pac. 173 (Okla.).

Petitioners lack the temerity to face these cases and ask this Court to overrule their doctrine, on which the business of marine insurance rests in its "great field." (Cf. Holmes, J., for the Court, in *Queen Ins. Co.* v. *Globe Ins. Co.*, 263 U. S. 487). They are unable to cite a single decision to the contrary *in the whole course of our national history.* They present the argument, for which no authority is cited, that the *McCarran Act* has given states the power to substitute 48 different rules, for the single uniform rule of the general admiralty or maritime law, intended by the Constitution in maritime affairs. That Congress is incapable of giving the states such powers appears to be settled by the decisions of this Court. (*Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149; *Panama R. R. Co.* v. *Johnson*, 264 U. S. 375, 386, and cas. cit.) Moreover, no such revolution was within the intent of the McCarran Act and statutes will be construed to avoid even substantial doubt of their constitutional validity. (*Panama R. R. Co.* v. *Johnson*, 264 U. S. 375, *supra; Messel* v. *Foundation Co.*, 274 U. S. 427; *Chelentis* v. *Luckenbach*, 247 U. S. 372) There are other objections, as pointed out below, to Petitioners' suggestion that, by the McCarran Act, Congress has in effect amended the Constitution by empowering states to substitute their diverse and clashing codes for the nationally uniform maritime law, a law that under the *Constitution* is subject to change only by Congress, and only within the limitations of the Constitutional requirement of national uniformity.

This contract was made and issued in Illinois, covering a vessel that was located in Mississippi when it attached, covering it while it was used thereafter in several states, on navigable waters of the United States, that was rarely and only transitorily in Texas, and whose home berth was in Oklahoma. Defendant never asked anybody to enter into this contract; the approach was from the Petitioners'

side to H. H. Cleaveland Agency, in Rock Island, Illinois, which was requested to ask Defendant, acting in Chicago, Illinois, to continue this policy for the new owners and the necessary endorsement was completed and issued in Illinois. By the law of Illinois where it acted, H. H. Cleaveland Agency, which had no general authority to commit Defendants on risks so far from home (White Dep. 12, Exh. 1; Rossow Dep. 42) was Petitioners' agent when, at McKinney's request, it telephoned and wrote and went to see Defendant, to induce it to issue this policy. (*France* v. *Citizens Casualty Company*, 400 Ill. 55; 79 N. E. 2d 28 (1948). See also, *Insurance Co.* v. *Midwest Transfer Co. of Illinois*, 178 F. (2d) 191 (CA 7, 1949).) The endorsements were never signed by a Texas agent; they were in each instance prepared by Defendant in Illinois, and sent to H. H. Cleaveland Agency in Illinois, which countersigned them in Illinois, and mailed them in Illinois. (*Vide supra.*) If a loss had occurred after that mailing in Illinois but before receipt of the policies in Texas, Petitioners would have no difficulty in perceiving that such mailing in Illinois was the last act needful to make them effective. (Auth. cit.) Appellants' reliance is on the circumstance that the Wilburn brothers are inhabitants of Texas, and they cite in a footnote (Petition, p. 7) Texas Insurance Code, 1951, Sec. 21.41 (*Vernon's Texas Statutes*, 5054), upon which they heavily relied before the Court of Appeals, and which purports to make Texas laws govern every contract of insurance payable to any citizen or inhabitant of Texas by any insurance company doing business in Texas.

Obviously, this contract did not constitute doing business in Texas. This Court holds that a state has no power, under the 14th Amendment to the Federal Constitution, to subject a contract to its laws on the ground that one of the parties thereto is its citizen. (*Hartford Ind. Co.* v. *Delta Co.*, 292 U. S. 143); and an attempt by a state to

require submission to its laws, as to contracts with its citizens that are completed in other states, would be a void attempt to exercise extra-territorial authority under the 14th Amendment. (*Fidelity & Deposit Co.* v. *Tafoya*, 270 U. S. 426.) Most interestingly, whatever other business a company might be doing in Texas,[13] the Texas courts themselves decline to give this Texas statute the construction and effect contended for. Even though the contract is with an insurer doing other business in Texas, and is payable to a citizen of Texas, when in fact, such contract was made in another state (as this contract was made and completed in Illinois), the Texas court holds it to be governed by the law of such other state, where it was made. (*Washington National Ins. Co.* v. *Shaw, et al.*, 180 S. W. (2d) 1003 (Tex. Civ. App.); *Metropolitan Life Ins. Co.* v. *Greene*, 93 S. W. (2d) 1241 (Tex. Civ. App.).)

But assume (not concede) that Texas laws did apply; what do they say?

Section 6.14 (Vernon's Texas Statutes, 4930) says the breach must contribute to the loss. In the construction that Petitioners assume to be the correct one, such a provision, which, by its very nature cannot itself be a cause of the loss, would never be enforceable in Texas. Appellants overlook that by the settled construction of this Texas statute by the Texas courts themselves, such a provision, for the very reason that breach thereof cannot itself contribute to the loss, is not within the contemplation of this statute. As we have already pointed out (*vide supra*) the rule is a well-settled feature of Texas jurisprudence, and such provisions, whose breach could not of itself contribute to the loss because they are of the kind that could not, are enforced as written, and their violation precludes recovery—under the law of Texas. (*Home*

[13] And this record does not show that this defendant ever did, or solicited any, there.

Ins. Co. of New York v. *Henderson*, 263 S. W. 650 (Tex. Civ. App.) *supra; National Fire Ins. Co.* v. *Carter*, 237 S. W. 1089 (Tex. Com. App.) *supra*, and other Texas authorities referred to above.)

Again, Petitioners say that any provision against mortgaging insured property is void, relying on Texas Insurance Code, 1951, Sec. 5.37 (Vernon's Texas Statutes 4896). This section of the Act says that it applies, as quoted by Petitioners at Petition 6, to "any company subject to the provisions of this law." It is one section of that law, whose preceding and defining section (Vernon's Texas Statutes, 4880; Texas Ins. Code, 1951, 5.27) defines the companies subject to that law in terms of the nature of the particular risk written. (See margin) [11]

It will be observed that this present situation is excluded by both the commencement and the conclusion of the defining section of this law. This was not a policy of insur-

[11] Texas Ins. Code 1951, pp. 74, 75, Sec. 5.27:

"Every fire insurance company, every marine insurance company, every fire marine insurance company, every fire and tornado insurance company, and each and every insurance company of every kind and name issuing a contract or policy of insurance, or contracts or policies of insurance against loss by fire *on property within this State*, whether such property be fixed or movable, stationary or in transit, or whether such property is consigned or billed for shipment within or beyond the boundary of this State or to some foreign county (sic), whether such company is organized under the laws of this State or under the laws of any other state, territory or possession of the United States, or foreign country, or by authority of the Federal Government, now holding certificate of authority to transact business in this State, shall be deemed to have accepted such certificate and to transact business thereunder, upon condition that it consents to the terms and provisions of this subchapter and that it agrees to transact business *in this State*, subject thereto; *it being intended* that every contract or policy of insurance against the hazard of fire shall be issued in accordance with the terms and provisions of this subchapter, and the company issuing the same governed thereby, regardless of the kind and character of such property and whether the same is fixed or movable, stationary or in transit, including *the shore end* of all marine risks insured against loss by fire." (Our emphasis)

ance "on property within this state," viz., Texas, "nor a transaction" in that state. (*Vide supra.*) Especially significant, the concluding phrase defining what is "intended" by this act says: "including *the shore end* of all marine risks insured against loss by fire." *Expressio unius est exclusio alterius.*

Policies covering property in transit by land and water are familiar, but there was no "shore end" to this marine risk. It was a maritime contract of insurance on the hull of a navigating vessel against the perils of the seas (in the classic language of the marine perils clause on hulls) and liability for collision with any other ship or vessel, covering the vessel on navigable waters of the United States where she was burned and sank 300 feet from shore, in the boundaries of the State of Oklahoma (R. 119). The enactment just quoted, against the background of such cases as *Aetna Ins. Co.* v. *Houston Oil & Transport Co.*, 49 F. (2d) 121 (CA 5, 1931), is manifestly a disclaimer of any intent to apply this sub-chapter to the *water end* of marine risks such as this.

Again Petitioners argued that their misrepresentations were not available defenses, because, they said, the Texas statute says no misrepresentations can be relied on that are not incorporated in an application attached to the policy, relying on *Texas Insurance Code*, 1951, Sec. 21.24 (*Vernon's Texas Statutes*, 5050) and cases decided on Texas contracts. This Texas statute refers only to contracts or policies "issued or contracted for" in Texas. This contract or policy of insurance was not expressed, like some life policies, to be effective only when the premium was paid, and it is perfectly well settled that in the absence of such expression the contract is effective without payment of the premium. 44 Corpus Juris Secundum, 1055, 1075. This policy was contracted for and issued in Illinois—according to Texas law. (*Fidelity Mutual Life Assn.* v. *Harris*, 94 Texas 25, 57 S. W. 635, 638-639.) The rule

is very old (the *Harris* case cites and relies on *Shattuck* v. *Insurance Co.*, 4 Cliff. 598, Fed. Cas. No. 12,715) and it is the rule announced by the *Restatement, Conflicts of Law*, Sec. 317. As the Texas court put it in the leading Texas case:

> "The general rule is that the acceptance of the application and the issuance and mailing of the policy are all the acts that are essential to put the contract in force, and the fact that the policy is sent to an agent for unconditional delivery does not alter the effect of the transaction. *Shattuck* v. *Insurance Co.*, 4 Cliff. 598, Fed. Cas. No. 12,715."
>
> *Fidelity Mut. Life Assn.* v. *Harris*, 94 Texas 25, 57 S. W. 635, 639.

Again, Petitioners would rely on *Texas Insurance Code*, 1951, Sec. 21.04 (*Vernon's Texas Statutes*, 5056) to make McKinney the "agent" of this defendant (and they grossly misquoted this statute to the District Court when they argued the case to it) (R. 218-219). Here, they lift a section of the act out of its context and fail to advise this Court of the settled construction of this law by the Texas courts, *a construction that has been recognized by this Court*, and which excludes it from any possible significance here. Actually, this is one section of a statute, which, in the first and next preceding section says that it shall not be lawful for anyone to act as an insurance agent in Texas "without first procuring a certificate of authority from the Board," and proceeds, in the next section, the one relied on by Petitioners, to say that any person who does certain acts shall be regarded as the agent of the company "as far as relates to all the liabilities, duties, requirements and penalties set forth in this chapter." These "liabilities, duties, requirements and penalties" are certain criminal, penal and administrative regulations of persons who solicit insurance in Texas; it is held by the Texas courts that this Texas statute does not purport to make the assured's

broker into an "agent" for the company in the general or ordinary sense, and especially not in the sense of estopping the insurer by his knowledge. (*Hartford Fire Ins. Co.* v. *Walker*, 94 Tex. 473, 61 S. W. 711; *Retailers Fire Ins. Co.* v. *Jackson Gin Co.*, 10 S. W. (2d) 799 (Tex. Civ. App.); *U. S. Fidelity & Guaranty Co.* v. *Taylor*, 273 S. W. 320 (Tex. Civ. App.); *Boseman* v. *Insurance Co.*, 301 U. S. 196, 206.) [15]

It would seem therefore that even if the laws of the State of Texas were to be construed as meant to govern this contract merely because the payee lived in Texas, it would be a void attempt to give those laws extraterritorial effect. And even if that provision had made, or could make, other Texas laws applicable, they have not been so written as to make them applicable to this situation.

As stated, the case went to trial on the Petitioners' averment that they had performed the provisions and conditions of the policy, and Defendant's denial of that averment specifying the provisions breached. The trial re-

[15] McKinney was a man to whom the Wilburns went to get their insurance; having no facilities for procuring marine insurance he approached H. H. Cleaveland Agency of Rock Island, Illinois, asking it to contact this defendant in Chicago and secure this insurance, as pointed out above. He acted throughout as a representative of assured, seeking the insurance, and arguing with Cleaveland in correspondence for the claim. (Rossow, Dep. passim.) This defendant does not appear ever to have heard of him, and does not appear to have had any communication or dealing with him whatever, in connection with anything or at any time. At one time, after the policy issued, he attempted to foist himself on Cleaveland as having become meantime an agent for this defendant, but the District Court struck this from the record on settled principles (R. 160, 161) and Petitioners assigned no error on the ruling in the Court of Appeals nor do they complain of it here. There is no claim or finding that McKinney was in fact agent of anyone but the Wilburns; on the contrary, Petitioners themselves made part of the record their Exhibit 2 (R. 255-260) which further shows that McKinney never was agent of this defendant, for this or any other transaction. Petitioners did not call their man McKinney to testify.

sulted in stipulation of Defendant's breaches (R. 40-43). Petitioners had not proved performance of the provisions and conditions of the policy, but had stipulated their breach (R. 40-43). The trial also resulted in such proof that Petitioners now admit that the representations of a $40,000.00 investment in the vessel were false (*see supra*). Accordingly, Defendant moved to dismiss (R. 176) under the rules governing the Federal Court's procedure, under which it is held:

> "Appellee takes the position, in which we concur, that under Rule 41 (b) of the Federal Rules of Civil Procedure, 28 U.S.C.A., upon a motion to dismiss at the close of the plaintiff's case, the trial court determines the facts without being thus limited and must weigh and evaluate the evidence.
>
> "(2) In this case the trial court was the trier of the facts, and in considering the evidence was not bound to view it in a light most favorable to the plaintiff, with all attendant favorable presumptions, but was bound to take an unbiased view of all the evidence, direct and circumstantial, and accord it such weight as he believed it entitled to receive. Rule 41 (b), Federal Rules Civil Procedure, *supra; Gary Theater Co.* v. *Columbia Pictures Corporation,* 7 Cir., 1941, 120 F. 2d 891, 892; *Young* v. *United States,* 9 Cir., 1940, 111 F. 2d 823, 825; *Bach* v. *Friden Calculating Mach. Co.,* 6 Cir., 1945, 148 F. 2d 407, 411.' "
>
> *Allred* v. *Sasser,* 170 F. 2d 233, 235 (CA 7, 1948).

The policy is in writing; the Petitioners' breaches are stipulated and admitted. No question was made in the Court of Appeals, and accordingly as between these parties for the purposes of this case none can be, or is, made here, that Lake Texoma is navigable waters of the United States, or that this was a maritime contract of a most important and familiar type, namely, a contract of marine insurance. The District Judge (like the Court of Appeals) found it unnecessary to labor questions of the conflict of laws between the states, for the reason that the parties in fact had

obviously contracted under the maritime law,[15a] and some time before his death made and filed with the Clerk (R. 32-34) the following findings of fact and conclusions of law:

UNITED STATES DISTRICT COURT
Eastern District of Texas

RANDOLPH BRYANT
U. S. District Judge

Sherman, Texas
December 28, 1950

Re: Civ. 503 Sherman Division
Wilburn Boat Company v. *Fireman's Fund Insurance Company*

Gentlemen:

After much consideration of the above matter, I am of the opinion that the policy involved here is a maritime contract and therefore governed by the general admiralty law and not by the law of Texas, since the policy covered the vessel on navigable waters of the United States, without as well as within the State of Texas, and I find that the waters of Lake Texoma are navigable waters of the United States.

Since the policy contained an express provision "that this insurance shall be void in case this policy or the interest insured thereby shall be sold, assigned, transferred pledged without the previous consent in writing of the assurers", and since it is admitted that the assureds were Glenn, Frank and Henry Wilburn, and that they did assign their interest in the vessel to an Oklahoma corporation, and since it is further admitted that they pledged the vessel to the Denison bank, a failure of performance of the terms of the contract is indisputably shown, and for such reason they are not entitled to recover.

Further, it was "warranted by the assureds that the within named vessel shall be used solely for private pleasure purposes during the currency of this policy and

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[15a] The District Judge cited page 313 of this Court's opinion in *Union Fish Co.* v. *Erickson*, 248 U. S. 308, where it was held: "The parties must be presumed to have had in contemplation the system of maritime law under which it was made."

shall not be hired or chartered unless permission is granted by endorsement hereon". The record shows without dispute, that this warranty was violated and that no permission was ever granted by endorsement on the policy for use other than for private pleasure purposes.

I think that the authorities are clear to such effect. *Aetna Insurance Company* v. *Houston Oil & Transport Company*, 49 F. 2d 121 at page 124; *Imperial Fire Insurance Company* v. *Coos County*, 151 U. S. 452; *Union Fish Company* v. *Erickson*, 248 U. S. 308 at page 313.

Inasmuch as the above findings, in my opinion, are determinative of the issues in this case, I do not think it is necessary to make any other findings of fact, and attorneys for the defendant may prepare findings of fact and conclusions of law in accordance with the above, as well judgment pursuant thereto, furnishing attorneys for plaintiffs with a copy of such proposed findings, conclusions and judgment.

Yours very truly,

/s/ RANDOLPH BRYANT.

I.

Under the due process clause of the XIVth Amendment to the Federal Constitution, by which no state can give its Legislation extra-territorial effect, the only question brought forward by this Petition, namely, a supposed conflict between the General Admiralty or Maritime Law and the Texas Law, cannot arise as to this Contract—which was made in Illinois. No question of conflict between the General Admiralty or Maritime Law, and the Illinois Law, is brought forward; No claim is made that there is any such conflict, or that Illinois Law, any more than the Maritime Law, would permit Recovery in the teeth of the terms of the contract. The Petition here brings forward and argues only the moot question of a supposed conflict between the General Maritime Law and Texas Law. We do not understand that certiorari will be granted to consider arguments addressed to a moot question, especially when Petitioners, by incorrect statements of the record, carefully avoid raising the only question that could give those arguments relevance to the correctness of the judgment of dismissal.

The real facts are that, contrary to the assertions of the Petition (pages 2 and 7, for example) this policy was neither solicited nor made "within the boundaries of the State of Texas." It was made, and completed, and delivered, in the State of Illinois. (*Vide supra.*)

It was a typical policy of marine hull insurance; and marine hull insurance is written on the basis of the general maritime or admiralty law. (*DeLovio* v. *Boit*, 2 Gall. 398; Fed. Cas. No. 3,776 at p. 443 (CA 1, Mass. 1815).) But even if that were not so, and even if state laws governed the effect of contracts of maritime insurance, the due process clause of the XIVth Amendment to the Federal Constitution would forbid any effect to Texas legislation upon *this* contract which among other things (*vide supra*) was made

in Illinois with the "Western Marine Department, Chicago, Illinois" of a California company not shown ever to have solicited this or any insurance in the State of Texas, upon a vessel then in Mississippi, that was afterwards navigated in several states with a home berth in Oklahoma, and that was lost in Oklahoma while owned by an Oklahoma corporation not domesticated in Texas. (*Hartford Indemnity Co.* v. *Delta Co.*, 292 U. S. 143; *Fidelity and Deposit Co.* v. *Tafoya*, 270 U. S. 426.)

That is a proposition of federal law under the XIVth Amendment.

Not one word of this Petition *makes any argument* that the law of Illinois would condone Petitioners' stipulated breaches of this contract.

The short answer to this Petition for Certiorari is that it depends on the unsupported misstatement that this contract was made in Texas (whose law is argued to condone the admitted breaches) whereas in truth and fact it was made in Illinois, and that, for federal reasons, of due process, the law of Texas can have no application here; there being no attempt even to claim that the law of Illinois would permit a recovery in the teeth of these admitted breaches, and no pretense of bringing forward any such question. Accordingly, since the Petition does not even claim any conflict between the effect of the general maritime law and the laws of any state that, for federal reasons of due process could even be claimed to govern this contract, the question of conflict between the general admiralty law and state laws does not arise upon the presentation made.

The foundation of the Petition, and the only matter argued by the Petition, is an assumed conflict between the general maritime law and the law of Texas, which, if it existed, would be immaterial, for federal reasons of due process, since the law of Texas cannot affect the result even if there were no such thing as the general maritime

law. A conflict between the law of Illinois and the general maritime law is not even hinted by the Petition, to say nothing of being distinctly brought forward. (Supreme Court Rules, Rule 38 (2).)[16] The basis of the Petition to this Court is a series of bald misstatements to the effect that the contract was made in Texas. These statements of the Petition are not true, and under the due process clause of the XIVth Amendment the question of a conflict between the maritime law and *Texas* law is moot as to this contract, which was not made in Texas.

The question of conflict between general maritime law and Illinois law not being brought forward by this Petition, none of the matters it argues, however interesting, is here for decision. We submit that whatever view might be taken of the matters it argues, the Petition should be denied, for the reason that it scrupulously avoids bringing forward the one question that could make those matters relevant.[17]

Doubtless we could, and probably we should, end this reply here.

Lest it be thought that we find any substance in Petitioner's argument, however irrelevant it may be to any question truly arising on the Petition and record, we now answer Petitioners' propositions in detail. They are propositions revolutionary of Constitutional doctrine that has been reiterated for generations, on which important parts of the

[16] "Only questions specifically brought forward by the petition for certiorari will be considered."

[17] Of course the reason why Petitioners carefully avoid raising that question, is that Illinois leaves the effect of the terms of policies of marine insurance to be governed by the general maritime law, as mentioned *infra*, and if they were to bring forward that question—the only question that could make the matters they argue relevant to the correctness of the judgment—the judgment would immediately be affirmed. See also, *Langnes* v. *Green*, 282 U. S. 531, 538, for a further distinct point.

national economy depend, including the "great field" of marine insurance.

II.

This Maritime contract was governed by uniform Admiralty or Maritime Law. These Petitioners admitted on brief before the Court of Appeals that the McCarran Act was intended only to undo the effect of the Southeastern Underwriters Case. It was so intended; and should be so construed, in view of its language, legislative history, and the construction hitherto given it, especially as it would be void insofar as construed to destroy the national uniformity of the Maritime Law that governs Marine Insurance.

Before the Court of Appeals Petitioners conceded that this is a contract of marine insurance (R. 279) and that Lake Texoma is navigable waters of the United States. (R. 280.) They raise no question about such facts here.

The Constitutional significance of these facts is not minimized by the brevity of the concession.

This was a contract insuring a vessel against navigating perils in more than one state on navigable waters of the United States, named therein. It is expressed in terms that have characterized marine insurance, in this country and abroad, for generations (R. 233-247).

Its "perils of the seas" clause (R. 236) is in the classic form, hardly to be understood apart from its interpretation by the courts under the general admiralty or maritime law (*Union Marine Ins. Co.* v. *Stone*, 15 F. (2d) 937 (CA 7, 1926), and set forth in all standard works on the law of marine insurance published here or in England. (See *Arnould on Marine Insurance*, Sec. 374 (13th Ed. 1950).) Its clause as to the negligence of "masters, mariners, engi-

neers or pilots" (R. 238) came into the world-wide law of marine insurance through a decision of the House of Lords in the case of the vessel "Inchmaree" which established the general maritime law here and abroad (*Arnould on Marine Insurance, supra*, Sec. 783.) Its collision clause (R. 239, 245) is the familiar collision clause common to English and American policies of hull insurance. *Arnould on Marine Insurance, supra*, Secs. 792-796.) Examples could be multiplied of terms and provisions in familiar use in marine insurance, whose whole meaning and significance is fixed by the general admiralty or maritime law, and which the Court will readily perceive. (R. 233, et seq.).

Some of these are the "sue and labor" clause (R. 237; *Arnould on Marine Insurance, supra*, Sec. 22); "protection and indemnity" clause (R. 249; *Winter, Marine Insurance* (3rd Ed. 1951), pp. 274, 306) the "free of capture and seizure" clause (R. 237; *Arnould on Marine Insurance, supra*, (Sec. 905a-1)) and the "general average" clause (R. 244; *Arnould on Marine Insurance, supra*, Secs. 906-1007).

It would seem almost too plain for debate that this contract was made with reference to the general maritime law. The law of marine insurance is one of the outstanding and characteristic features of the general maritime law. This Court holds that as to that aspect of the general maritime law that governs marine insurance, there are "special reasons" for maintaining it in harmony with the law of England. *Queen Ins. Co.* v. *Globe Ins. Co.*, 263 U. S. 487. This is the ruling case, and the ruling doctrine in the Courts of this country. As the Court of Appeals for the Second Circuit says, "in matters maritime, and especially insurance, the importance of conformity between the English law and our own has been often emphasized." (Cit. auth.) (*New York & Oriental S. S. Co.* v. *Automobile Ins. Co.*, 37 F. (2d) 461, 463.) In the language of Augustus N.

Hand, J., "it is particularly desirable in cases of marine insurance that the decisions of the American and English Courts should be in harmony." *Mellon* v. *Federal Ins. Co.*, 14 F. (2d) 997, 1004.

Under the admiralty clause of the Constitution, the states are powerless to enact legislation that would "work material prejudice" to the characteristic features of the general maritime law "or interfere with the proper harmony and uniformity of that law in its international and interstate relations"—and Congress is equally powerless to give the states permission so to violate the Constitution. *Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149.

There is no argument that the clashing insurance codes of the states would not have the constitutionally forbidden effect. Appellants ignore, and thus confuse, the Constitutional situation.

Except in cases turning on the Constitution, Federal Statues and Treaties, there is no Federal common law; the diversity clause of the Third Article of the Constitution gives jurisdiction for the purpose of preventing local discrimination against non-residents in the judicial administration of law. (*Erie R. R.* v. *Tompkins*, 304 U. S. 64.)

The admiralty clause of the Third Article of the Federal *Constitution* gives Federal jurisdiction for a further reason; there *is* a general maritime law:

> "As there could be no cases of 'admiralty and maritime jurisdiction' in the absence of some maritime law under which they could arise, the provision presupposes the existence in the United States of a law of that character. Such a law or system of law existed in Colonial times and during the Confederation and commonly was applied in the adjudication of admiralty and maritime cases. It embodied the principles of the general maritime law, sometimes called the law of the sea, with modifications and supplements adjusting it

to conditions and needs on this side of the Atlantic. The framers of the Constitution were familiar with that system and proceeded with it in mind. Their purpose was not to strike down or abrogate the system, but to place the entire subject—its substantive as well as its procedural features—under national control because of its intimate relation to navigation and to interstate and foreign commerce. In pursuance of that purpose the constitutional provision was framed and adopted. Although containing no express grant of legislative power over the substantive law, the provision was regarded from the beginning as implicitly investing such power in the United States. Commentators took that view; Congress acted on it, and the courts, including this Court, gave effect to it. Practically therefore the situation is as if that view were written into the provision."

Panama R. R. Co. v. *Johnson*, 264 U. S. 375, 385.

This Court's doctrine has been clear:

"As the plain result of these recent opinions and the earlier decisions on which they are based, we accept the following doctrine: The *constitution itself* adopted and established, as part of the laws of the United States, approved rules of the general maritime law. (*Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149, 160.)

A contract of marine insurance is a maritime contract. *Insurance Co.* v. *Dunham*, 11 Wall. (78 U. S.) 1, 30-35 (1870).

In holding that a policy of marine insurance is a maritime contract, this Court said:

"Perhaps the best criterion of the maritime character of a contract is the system of law from which it arises and by which it is governed. And it is well known that the contract of insurance sprang from the law maritime, and derives all its material rules and incidents therefrom."

• • •

"It is, in fact, part of the general maritime law of the world; slightly modified, it is true, in each country, according to the circumstances or genius of the people. Can stronger proof be presented that the contract is a maritime contract?"

Insurance Co. v. *Dunham*, 11 Wall. (78 U. S.) 1, 31, 34 (1870).

This Court said further (Ibid, 35):

"The learned and exhaustive opinion of Mr. Justice Story in the case of *De Lovio* v. *Boit*, 2 Gallison, 398, affirming the admiralty jurisdiction over policies of marine insurance, has never been answered, and will always stand as a monument of his great erudition."

In the leading case so referred to, Mr. Justice Story held that a policy of marine insurance is a maritime contract under the admiralty clause of the Federal Constitution, and the climax and ultimate *ratio decedendi* of that classic opinion is of special pertinence. Rejecting the well-known restrictions of the old English common law courts and early constraining acts of Parliament, to which he referred as "statutable restrictions," the analysis concluded as follows:

"At all events, there is no solid reason for construing the terms of the constitution in a narrow and limited sense, or for ingrafting upon them the restrictions of English statutes, or decisions at common law founded on those statutes, which were sometimes dictated by jealousy, and sometimes by misapprehension, which are often contradictory, and rarely supported by any consistent principle. The advantages resulting to the commerce and navigation of the United States, from *a uniformity of rules and decisions in all maritime questions*, authorize us to believe that national policy, as well as juridical logic, require *the clause of the constitution to be so construed*, as to embrace all maritime contracts, torts and injuries, or, in other words, to embrace all those causes, which originally and inherently belonged to the admiralty, before any statutable restriction." (Our emphasis.)

De Lovio v. *Boit*, 2 Gall. 398; F. C. No. 3,776 at 443.

The opinion of the Supreme Court in the *Dunham* case, *supra*, holding a policy of marine insurance to be a maritime contract holds further that the jurisdiction extends "to all navigable waters of the United States, whether land-locked or open, salt or fresh, tide or no tide." (*Insurance Company* v. *Dunham*, *supra*, 25.)

It is apparent from these decisions, and has often been held, that the Constitutional purpose and policy requiring that the source of maritime law is never the states, but always the Federal sovereign, is that the Constitution "contemplated a body of law with *uniform* operation." (*Detroit Trust Co.* v. *Barium S. S. Co.*, 293 U. S. 21, 43.) For Congress to try to substitute the diversity of state laws for a uniform maritime law would be as offensive to the Constitution as for the states to do so; the Constitutional purpose that forbids the one, equally forbids the other. And so this Court holds. *Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149; *Panama R. R. Co.* v. *Johnson*, 264 U. S. 375, *supra*.

Petitioners seek deftly to embroil the present question in the controversy that arose out of *Southern Pacific Co.* v *Jensen*, 244 U. S. 205 by remarking that that particular case has been limited to Workmen's Compensation cases, citing a dictum from the opinion in *Standard Dredging Co.* v. *Murphy*, 319 U. S. 306, 309, to the effect that except in Workmen's Compensation the *Jensen* case had lost its "vitality," from which they would conclude that states are now free to substitute their divergent laws for the general maritime law. If their inference from this remark were correct, the uniform general maritime law required by the Constitution would have disappeared in the diverse laws of the states, legislative and decisional. That would be to defeat the Constitution. (Auth. cit.) What Petitioners overlook is that the controversy over the cases in the *Jensen* line has not extended to the principles here relied on.

This has been made clear by two opinions of this Court, written by the author of the opinion in *Standard Dredging Co.* v. *Murphy, supra.* The *Jensen* case involved the application of state workmen's compensation laws (which rest on a simple principle of absolute liability) to *stevedores*, men who work in a single harbor. The question whether or not that involved purely local matters, outside the policy of the Constitutional requirement of a uniform general admiralty law, can be, and has been, hotly debated. The point is that the debate has related entirely to that question, which, as pointed out in the first of the two opinions just referred to, is a question of fact. *Davis* v. *Department of Labor*, 317 U. S. 249 on 254. The degree of localization presented by a stevedore's harbor work, on a vessel at the dock in his port, may, or may not, fall outside the reason of the Constitutional policy requiring a nationally uniform maritime law. On that question of fact the *Jensen* case (except i.. Workmen's Compensation cases, where its flat precedent is binding) may or may not have lost its "vitality"; no such doubtful question of fact is presented here.[18]

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[18] The Court continued in the *Standard Dredging Co.* case:

> "In dealing with *employment* insurance, exclusive federal jurisdiction *is not affected at all.* Congress retains power to act in the field, *and in the meantime the federal courts have nothing to do with it.*" (*Idem*, 309)

This statement is not true of *marine* insurance contracts, which are distinctively *maritime contracts.* (*Vide supra.*)

It is interesting that, reading the dictum of *Standard Dredging Co.* v. *Murphy*, the Court of Appeals for the Second Circuit—while it did not go to the absurd extreme advocated by these Petitioners of supposing that the several states were free to substitute their own law for the general maritime law in all but Workmen's Compensation cases—fell into the error of saying, in *Guerrini* v. *U. S.*, 167 F. (2d) 352, that whether the maritime or state law applies "depends on the forum," an error that is retracted at the first opportunity in *Hedger Transp. Co.* v. *United Fruit Co.*, 198 F. (2d) 376 (CA 2), on the authority of *Garrett* v. *Moore-McCormack Co.*, 317 U. S. 239, referred to below, *Intagliata* v. *Shipowners, etc., Co.*, 26 Cal. (2d) 305, 159 P. (2d) 1, which relies

A contract of marine insurance on the hull of a vessel navigating in several states cannot be contended to be a merely local matter. And Petitioners (who must, if they can, avoid the Constitutional point) make no such argument. In fact, marine insurance written by an insurer in Illinois on the hull of a vessel in Mississippi for navigation in several states in favor of assureds resident elsewhere, is nearly the antithesis of a local matter. It calls into play in the highest degree the considerations held to underly the admiralty clause of our Federal Constitution, namely, the advantages resulting to the "navigation of the United States, from a uniformity of rules and decisions in all maritime questions." (*De Lovio* v. *Boit, supra*, holding that a policy of marine insurance is a matter of "admiralty and maritime jurisdiction" under the Constitution.) To reject, at this late date, the advantages of our Federal Constitution, and the settled doctrine "that national policy as well as juridical logic require the clause of the Constitution to be so construed,"[19] the doctrine which our Courts have followed down through the years—would be strange indeed, when experience so plainly teaches the advantages of a uniform national law for marine insurance that the Courts of the two great maritime nations have striven to achieve uniformity in the law of marine insurance even without the advantage of any federal union. (Auth. cit.)

The second of the two cases above referred to is explicit that the controversy over the Constitutional aspects of the

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squarely on *Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149, *supra*, *Colonna Shipyard* v. *Bland*, 150 Va. 349; 143 S. E. 729; 59 A.L.R. 497, a case cited by this Court in the Garrett case, and *Jansson* v. *Swedish American Line*, 185 F. (2d) 212 (CA 1, 1950), a brilliant summary of the effect of the cases by the Court of Appeals for the First Circuit, that leaves little to be added. See also *Hawn* v. *Pope & Talbot, Inc.*, 198 F. (2d) 800 (CA 3) repudiating any such construction of this Court's remark in the *Standard Dredging Co.* case as Petitioners seek to put upon it.

[19] *De Lovio* v. *Boit, supra*, as above quoted.

Jensen case has not extended to these principles. In *Garrett* v. *Moore-McCormack Co.*, 317 U. S. 239, the action, brought in a state court, turned on the validity of a seaman's contract of release. Applying state law the state court of last resort held the release valid. This Court granted certiorari and holding that by the general maritime law the release was void, reversed the state court for the error of applying its own law, even in its own courts, as the measure of the validity of a maritime contract. Clearing away the superficial suggestion that the controversy over the factual aspects of the *Jensen* case had anything to do with these principles, this Court said: "In many other cases this Court has declared the necessary dominance of admiralty principles in actions in vindication of rights arising from admiralty law." (317 U. S. on 244.) To this statement this Court cited *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205; *Chelentis* v. *Luckenbach S. S. Co.*, 247 U. S. 372; *Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149, 159; *Carlisle Packing Co.* v. *Sandanger*, 259 U. S. 255, 259; *Messel* v. *Foundation Co.*, 274 U. S. 427, 434 and *Schuede* v. *Zenith S. S. Co.*, 216 Fed. 566.

This Court then pointed out explicitly:

> "Disagreement over the Constitutional issues of the cases in the Jensen line has not extended to this principle. Cf. *The Lottawanna*, 21 Wall. 558, 575; *Detroit Trust Co.* v. *The Thomas Barlum*, 293 U. S. 21, 43."

In the case of *Detroit Trust Co.* v. *The Thomas Barlum*, so referred to, the unanimous court said:

> "But the grant presupposed a 'general system of maritime law' which was familiar to the lawyers and statesmen of the country, and contemplated a body of law with *uniform* operation. *The Lottawanna*, 21 Wall. 558, 575." (Our emphasis.)

This principle—so reaffirmed, and to which the disagreement in which Petitioners would embroil the present ques-

tion "has not extended"—is obviously necessary if the substantive admiralty or maritime law is not to disappear in diverse state-made rules, legislative and decisional. It is a Constitutional principle (auth. cit.) and neither the states nor Congress can defeat a Constitutional aim, as Petitioners do not dispute.

As pointed out in the passage already quoted from *Panama R. R. Co.* v. *Johnson*, 264 U. S. 375, 385, *supra*, the *Constitution* itself put into effect as an existing legal system, the general maritime law, to govern maritime contracts and maritime torts. This Court pointed out in *Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149:

> "As the plain result of these recent opinions and the earlier cases upon which they are based, we accept the following doctrine: The *Constitution itself* adopted and established, as part of the laws of the United States, approved rules of the general maritime law." (*Ibid*, 160.)

Quoting its former decision in *The Lottawanna*, 21 Wall. 558, 575, *supra*, this Court said:

> " 'One thing, however, is unquestionable; *the Constitution* must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulations of the several States, as that would have defeated the uniformity and consistency at which the Constitution aimed,' " etc. (Our emphasis.) (*Ibid*, 161.)

To permit the laws of the several states to have such effect, would destroy "the uniformity and consistency at which the Constitution aimed" with respect to "all cases of admiralty and maritime jurisdiction." (*Constitution*, Art. III.) These Constitutional doctrines are firmly established by many decisions.

In *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205, the question was whether a maritime contract (and one there held, rightly or wrongly, *not* to be of purely "local" import) was governed by the general maritime law, or by the law of the State of New York where it was made and performed.[20]

It was held that the uniformity prescribed by the Constitution required the application of the uniform general maritime law and that the state legislation could not change it. *Chelentis* v. *Luckenbach S. S. Co.*, 247 U. S. 372, was a suit for damages in a common law court. It was held that, though action had been brought in a common law court, that court could only give such relief as would be given under the general maritime law "without regard to the court where he might ask relief." (*Idem*, 384.) In *Union Fish Co.* v. *Erickson*, 248 U. S. 308 (1918), the contract was for the employment of the master of a vessel for services to be performed principally on navigable waters. The contract was oral, and the statute of California (enacted like similar statutes in nearly all the states, after the pattern of the Statute of Charles II "For the Prevention of Frauds and Perjuries"), declared it void because it was oral. This Court held that the contract was maritime in nature and governed by the general maritime law, whereby it was valid, and held, affirming the Circuit Court of Appeals:

> "If one State may declare such contracts void for one reason, another may do likewise for another. Thus the local law of a State may deprive one of relief in a case brought in a court of admiralty of the United States upon a maritime contract, and the uniformity of rules governing such contracts may be destroyed by perhaps conflicting rules of the States."
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> *Union Fish Co.* v. *Erickson*, 248 U. S. 308, 314 (1918).

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[20] This was a question of the effect of the maritime contract. *Schuede* v. *Zenith S. S. Co.*, 216 Fed. 566 cited in *Garrett* v. *Moore-McCormack Co.*, 317 U. S. 239, 244, N. 10.

It seems apparent that "the uniformity and consistency at which the Constitution aimed" by the admiralty clause is effectively defeated if a party may invoke state-made law to govern a maritime matter merely by suing in a state court. Section 9 of the Judiciary Act of 1789 (1 Stat. 76, 77), gave to District Courts of the United States exclusive cognizance of all civil causes of admiralty and maritime jurisdiction, "saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it."[22]

This *Act of Congress* was argued to make state-made law decisive in actions on maritime contracts and torts brought in state courts. But it could not do that if the uniformity "aimed at" by the Constitution were to be maintained. Quoting this Act of Congress, this Court remarked that "different views have been entertained concerning it."[23] *Chelentis* v. *Luckenbach S. S. Co.*, 247 U. S. 372, 383, *supra.* The Court referred to the *Jensen case,* and said:

> "Concerning the extent to which the general maritime law may be changed, modified or affected by state legislation this was said: 'No such legislation is valid if it contravenes the essential purpose expressed by an act of Congress or works material prejudice to the characteristic features of the general maritime law or interferes with the proper *harmony and uniformity* of that law in its international *and interstate relations. This limitation, at the least, is essential to the effective operation of the fundamental purposes for which such law was incorporated into our national laws by the Constitution itself.* These purposes are forcefully indicated in the foregoing quotations from *The Lotta-wanna*' (21 Wall. 558, 575). Among such quotations

[22] Since some of the cases herein referred to, this section has been changed slightly in verbiage, but not in intent, as the revisers' notes show; it is still "exclusive" federal jurisdiction. *Jansson* v. *Swedish American Line*, 185 F. (2d) 212 (CA 1, 1950).

[23] Apparently referring to the dissents in the *Jensen* case, above cited.

is the following: 'One thing, however, is unquestionable; the Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several states, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states.' " (Our emphasis.)

Chelentis v. *Luckenbach S. S. Co.*, 247 U. S. at 381-382.

On that premise this Court turned to the Act of Congress above referred to, that saves to suitors in admiralty matters a right to a common law remedy, and said:

"Plainly, we think, under the saving clause a right sanctioned by the maritime law may be enforced through any appropriate remedy recognized at common law; but we find nothing therein which reveals an intention to give the complaining party an election to determine whether the defendant's liability shall be measured by common-law standards rather than those of the maritime law. Under the circumstances here presented, without regard to the court where he might ask relief, petitioner's rights were those recognized by the law of the sea."

(*Ibid*, 247 U. S. on 384.)

In view of the constitutional premise it laid for this construction, it seems that the court was here observing its "cardinal rule" hereinafter referred to, to interpret acts of Congress in such a way as to avoid the conclusion of unconstitutionality.

Citing these cases, this Court held in *Carlisle Packing Co.* v. *Sandanger*, 259 U. S. 255, 259 (1922):

"The general rules of the maritime law apply whether the proceeding be instituted in an admiralty or common law court. *Chelentis* v. *Luckenbach S. S.*

Co., supra; Knickerbocker Ice Co. v. *Stewart*, 253 U. S. 149, 159.

> "Here the trial court did not instruct the jury in consonance with these rules, and by failing so to do, fell into error."

It is apparent that *Erie R. R.* v. *Tompkins, supra*, and its undoubted principle that there is no general *common* law, has nothing to do with maritime contracts. There *is* a general maritime law, and the purpose *of the Constitution* is that it shall have *uniform* operation as to "all matters of admiralty and maritime jurisdiction." (Auth. cit.)

In *Garrett* v. *Moore-McCormack Co.*, 317 U. S. 239 (1942) the issue was the burden of proof upon the validity of a seaman's contract of release. The case was in the state court at common law, and was litigated, in the courts of the state, to the highest court of the state, all holding, under the law of the state, that the release was valid. The general maritime law has its own principles on the subject (just as it has with respect to the necessity of strict observance of express stipulations of a contract of marine insurance, see *Home Ins. Co.* v. *Ciconett*, 179 F.2d 892, 894 (CA 6, 1950) and auth. cit.). This Court reversed the state courts for failing to apply the general maritime law. *Erie R. R.* v. *Tompkins* was urged. The unanimous court held that the state was wrong to apply its own law, and in failing to apply the general maritime law, saying also:

> "In many other cases this court has declared the necessary dominance of admiralty principles in actions in vindication of rights arising under admiralty law."
>
> *Garrett* v. *Moore-McCormack Co.*, 317 U. S. 239, 244 (1942)—and cases cited.

Southern Pacific Co. v. *Jensen*, 244 U. S. 205, *Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149, and *Chelentis* v.

Luckenbach S. S. Co., 247 U. S. 372, among others (all above referred to) were cited.[24]

The foundation principle of these cases (and many others) is that it is "unquestionable" that the Constitution referred to "*a system of law coextensive with, and operating uniformly in, the whole country.*" (Auth. cit.)

For these Constitutional reasons states are not permitted to apply their own laws to maritime matters, even in their own courts—it would defeat "the *uniformity* aimed at by the Constitution." (Auth. cit.)

When the *Jensen* case was decided, Congress promptly seized on some of the language therein to enact, in substance, that state laws should apply to maritime contracts of the sort there involved, which had been held to fall within the Constitutional requirement. The Supreme Court held that to be beyond the power of Congress. (*Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149.) Congress can, indeed, legislate to change the rules of the maritime law; but an attempt by Congress *to make state laws effective* in maritime matters not of a purely local nature, overlooks the *Constitutional reasons* why states are held powerless to change the general maritime law, namely, that the *Constitution* aimed at national *uniformity* of law in "matters of admiralty and maritime jurisdiction." (Auth. cit.) Uniformity is destroyed by giving state laws effect in the maritime field. Uniformity is just as much destroyed by an Act of Congress that says state laws shall be effective in the maritime field. The Constitutional reason that forbids the one, equally forbids the other.

The *Constitution* aimed at national uniformity in the general maritime law; the Constitution is just as binding on Congress as it is on the states. Congress could not, on its

[24] The express holding was (317 U.S. on 245) that the true meaning of *Erie R. R.* v. *Tompkins* is *not* to make State law dominant in the maritime field, *but* the precise contrary.

judgment of policy, make the diversity of state laws the rule in the maritime field; the *Constitution* inhibits that policy (Auth. cit.). This Court laid down the following premises:

> "As the plain result of these recent opinions and the earlier cases upon which they are based, we accept the following doctrine: The Constitution itself adopted and established as part of the laws of the United States, approved rules of the general maritime law and empowered Congress to legislate in respect of them and other matters within the admiralty and maritime jurisdiction. Moreover, it took from the States all power, by legislation or judicial decision, to contravene the essential purposes of, or to work material injury, to characteristic features of such law or to interfere with its proper harmony and uniformity in its international and interstate relations. To preserve adequate harmony and appropriate uniform rules relating to maritime matters *and bring them within control of the Federal Government* was the fundamental purpose; and to *such* definite end Congress was empowered to legislate within *that* sphere." (Our emphasis.)
>
> (*Ibid*, 253 U. S. 149, 160.)

Rejecting the attempt to analogize power of Congress to validate state law under the *commerce* clause to the asserted power to validate state laws involving the *admiralty* clause, the Court said at page 161:

> "The distinction between the indicated situation created by the Constitution relative to maritime affairs and one resulting from the mere grant of power to regulate commerce without more, should not be forgotten."
>
> (*Ibid*, 253 U. S. 161.)

Referring to cases in which Congress has, by its enactment under the *commerce* clause, validated state laws otherwise void, the court said further at page 166:

> "Here, we are concerned with a wholly different constitutional provision—one which, *for the purpose*

> *of securing harmony and uniformity*, prescribes a set of rules, empowers Congress to legislate to *that* end, and prohibits material interference by the States. Obviously, if every State may freely declare the rights and liabilities incident to maritime employment, there will at once arise the confusion and uncertainty which framers of the Constitution both foresaw and undertook to prevent." (Our emphasis.)
>
> (*Ibid*, 253 U. S., 166.)

This was held in striking down an *Act of Congress* that purported to turn over to the states power to legislate in the maritime field.

This Court said at pages 163-164:

> "And so construed, we think the enactment is beyond the power of Congress. Its power to legislate concerning rights and liabilities within the maritime jurisdiction and remedies for their enforcement, arises from the Constitution, as above indicated. The definite object of the grant was to commit direct control to the Federal Government; to relieve maritime commerce from unnecessary burdens and disadvantages incident to discordant legislation; and to establish, so far as practicable, harmonious and uniform rules applicable *throughout every part of the Union.*" (Our emphasis.)
>
> *Ibid*, 253 U. S. 163-164.

Assuming that Congress were entirely free in any matter arising under the *commerce* clause to say that diversity shall be the rule and state laws shall apply, can Congress use its powers of legislation, where the *admiralty* clause is concerned—powers vested in it by the Constitution to the end of securing harmony and uniformity throughout every part of the Union, for the diametrically opposite purpose of creating the exact confusion and uncertainty of state control which the framers of the Constitution both foresaw and undertook to prevent? In the *Knickerbocker* case, *supra*, this Court has answered that question in the negative.

The utter diversity of the insurance regulations of the several states is a familiar phenomenon, within the judicial knowledge of this Court. Petitioners avoid the impossible position that, to substitute those forty-eight clashing systems for the uniform maritime law would not work "material prejudice to the characteristic features of the general maritime law" or interfere with "the proper harmony and uniformity of that law in its international and interstate relations." Petitioners do not dispute the principle, but put forward the *McCarran Act*—which, according to the principle laid down by this Court in cases we have hereinabove referred to, would be void in the application they propose. For what Petitioners propose would bring about a confusion and disharmony with respect to a prominent and characteristic feature of the maritime law, the law of marine insurance, that would almost infinitely exceed any following upon the application in the maritime field of state workmen's compensation acts (*Knickerbocker Ice Co.* v. *Stewart* 253 U. S. 149) or state statutes of frauds (*Union Fish Co.* v. *Erickson*, 248 U. S. 308.)

Petitioners say that the *McCarran* Act has given the states power to regulate the business of insurance, *and that this includes the validity and effect of the terms of maritime contracts of insurance.* It seems evident under these authorities that, if the *McCarran Act* were so understood, to displace the general maritime law that governs marine insurance, with the 48 divergent legal systems of the states, it would be beyond the Constitutional powers of Congress. For, as held in the cases cited, the Constitution "aims at uniformity" in the maritime law, and it gives Congress the power to legislate in matters touching the maritime law to *that* end, not for the diametrically opposite end of creating the very confusion and uncertainty, namely, state control, which the framers of the Constitution both foresaw and undertook to prevent. To construe the powers

of Congress to include the validation of 48 sets of state laws in the maritime field of *marine contracts of insurance*, would be to say that Congress had power to defeat the purpose of uniformity and harmony which was the very object of its legislative powers in the field of the general maritime law, and to revive the very situation of diverse state control that the Constitution aimed to prevent.

Marine contracts of insurance are maritime contracts, and prime objects of the Constitutional purpose of uniformity. They are not at the fringe of the admiralty and maritime jurisdiction; again, there is no such argument. They are at the very heart of it. This Court has emphasized that marine insurance is a business having a "great field," and that there are "special reasons" why our law governing these maritime contracts should be kept consonant with English law. *Queen Ins. Co.* v. *Globe Ins. Co.*, 263 U. S. 487. As pointed out above, marine insurance contracts were held to be subject to the "Admiralty and maritime jurisdiction" of the Constitution with express and special reference to the apparent advantages of a uniform national system of law by Story, J. (*DeLovio* v. *Boit*, 2 Gall. 398; F. C. No. 3,776 at 443, *supra.*) This decision was emphatically approved by this Court, as above quoted, this Court saying, indeed, that marine contracts of insurance are plainly maritime contracts *because* in all their material rules and incidents they are derived from, and governed by, and part of the general maritime law. *Insurance Company* v. *Dunham*, 11 Wall. (78 U. S.) 1, 31, 34 (1870) *supra.*

It is held:

> "The policy covered the vessel on navigable waters of the United States without as well as within the state of Texas. It was a maritime contract, and there-

fore governed by the general admiralty law and not by the law of Texas."

Aetna Ins. Co. v. *Houston Oil & Transport Co.*, 49 F.2d 121, 124 (CCA 5, 1931); cert. den. 284 U. S. 628 (1932.)

The ground of the decisions is that the Constitution aims at uniformity in this field. When Congress attempted to make state laws effective in that field, that was held to be beyond the powers of Congress, for the same reason—the Constitution aims at uniformity of the general maritime law, and Congress lacks power to defeat Constitutional aims. See *Knickerbocker Ice Co., supra.* Petitioners say that by the *McCarran Act* Congress has again attempted to make state laws applicable in this maritime field. So understood, it would fall under the condemnation of the Constitution as construed by this Court, in the authorities cited; for the Constitution aims at uniformity in the general maritime law, of which the law of marine insurance is an integral part, and peculiarly subject to the Constitutional requirement of uniformity (Auth. cit.).

Petitioners ask this Court to overrule its decisions on the ground that by the *McCarran Act* Congress has now prescribed a rule of diversity in the maritime field for the effect of contracts of marine insurance. But it is settled that *the Constitution* prescribes uniformity of the general maritime law. How can *Congress* prescribe diversity, when the *Constitution* prescribes uniformity? The same Constitutional reason that dictated decision in the cases in which this Court rejected state law in this field, equally prevents any attempt by Congress to destroy the uniformity at which the Constitution aimed by legislating that the diverse laws of the states shall replace uniformity in that field. *Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149. To overrule this settled doctrine would be revolutionary; this Court would

thereby have to reject the whole principle that the *Constitution* aims at the existence of a general maritime law. The Petitioners are asking a good deal.

The validity of the Constitutional objective of a uniform general maritime law finds striking illustration in the facts of this case. Here is a vessel in the state of Mississippi, and an insurer in the state of Illinois, who is asked to continue the existing coverage in favor of some new buyers resident elsewhere, for navigation of the vessel through many states, down the Mississippi River, up the Red River, and on Lake Texoma, which lies in two states. The facility with which the transaction was effected, and the low premium charge, would certainly have been impossible if the parties had been forced to figure out in advance, and at their peril, what a court would do with a complicated problem of the conflict of laws between the states, and what those laws at the moment might be as to all the problems presented by the contract. Under the authorities referred to, maritime transactions have not been encumbered with any such confusion and uncertainty. The authorities declare that it was a purpose of the Constitution, when the several states became a nation, that they should not be so encumbered. Under the doctrine settled by the authorities, including the decisions of this Court, the parties had a right to expect that they *could not* be so encumbered, and to contract on the basis of that constitutional assurance.

> "The parties must be presumed to have had in contemplation the system of maritime law under which it was made. *Watts* v. *Camora*, 115 U. S. 353, 362."
>
> *Union Fish Co.* v. *Erickson*, 248 U. S. 308, 313 (*supra*).

They had a right, that is to say, to contract in the assurance that their contract would be binding as written, for that is the maritime law. (*Home Ins. Co.* v. *Ciconett*, 179 F. 2d 892, 894 (CA 6, 1950) collects cases.)

To reject the authority of all the cases, as Petitioners ask the Court to do, on the supposed ground that Congress has destroyed the uniformity aimed at by the *Constitution*, would instantly imperil every outstanding contract of marine insurance. Even more disastrous, the present uniform legal basis of marine underwriting would disappear. This is apparent from the history of the law of the subject shown by the foregoing authorities. Practices now uniform throughout the nation (indeed, throughout a large part of the civilized world) and based in some instances on decisions of the courts over "the last 300 years" (*Read* v. *Agricultural Ins. Co.*, 263 N.W. (Wis.) 632, 634) would become perilous overnight. The cost of writing and servicing marine policies would greatly increase, and premiums accordingly. The least serious consequence would be that the intended effect of every outstanding marine policy would be destroyed. The legal basis on which the business of marine insurance stands in its great field is the general maritime law (*Queen Ins. Co.* v. *Globe Ins. Co.*, 263 U. S. 487; *Aetna Ins. Co.* v. *Houston Oil & Transport Co.*, 49 F. 2d 121 (CA 5, 1931) and to destroy the legal institutions on which a great business rests is to disorganize a whole section of the economy.

It would be ironical to find that result in the intention of the *McCarran Act*. For it is notorious, and spelled out in the report of the committee of Congress, that the whole purpose of the *McCarran Act* was to *avoid* the dislocation of the economy consequent on the overruling of established doctrine. The Act was passed, the Committee points out in response to the Supreme Court's decision in *U. S.* v. *Southeastern Underwriters Ass'n, et al.*, 322 U. S. 533, which, reinterpreting *Paul* v. *Virginia*, 8 Wall 168, held, for the first time, that insurance is interstate *commerce*. The Committee report, referring to the *Southeastern* case as

"precedent-smashing" (U. S. Code, Cong. Serv., 79th Cong. 1st Sess., 671) points out the confusion following on this upsetting of judicial doctrine. It was careful to say:

> "It was *not* the intention of Congress to clothe the states with *any* power to regulate or tax the business of insurance beyond that which they *had been held to possess* prior to the decision of the United States Supreme Court in the Southeastern Underwriters Association case." (Our emphasis.)
>
> H. R. 143, 79th Cong. 1st Sess.; U. S. Code Cong. Serv., 671.

States had never been "held to possess" the power to impair the uniformity of maritime law with respect to marine insurance. On the contrary, they had been held not to possess it (Auth. cit.).

While the diverse and elaborate insurance codes of the states have sometimes left the courts to presume that they are meant to operate only within the Constitutional scope of state action, they, themselves, often warn against any interpretation that would exceed constitutional powers in the maritime field.[25]

It would be ironical indeed to find in the *McCarran Act* itself "precedent smashing" intent to give the states power over marine insurance they never before were "held to possess." That would be to make the act the means of

[25] Thus the Texas code provision forbidding stipulations against mortgages, applies to companies mentioned "in this law," which are defined in terms of the nature of the risks they cover, the concluding clause of this defining section being an intent clause, explaining "the intent hereof" as being to cover "the shore end" of marine risks. (*Vernon's Texas Statutes*, 4880; *Texas. Ins. Code*, Sec. 5.27.) The Illinois code, in a provision quoted below expressly excludes all policies of marine insurance. (Ill. Ins. Code, Smith Hurd Ill. Stat. ch. 73, § 766.) These exclusions are made for the reason that these are marine policies. *Levine* v. *Aetna Ins. Co.*, 139 F. 2d 217, 218, commenting on like exclusions of marine policies from the Insurance Code of the State of New York.

creating, in the field of marine insurance, the confusions resulting from the reinterpretation of settled doctrine in another field that it was enacted to avoid.

If that were the necessary effect of the language of the act, that ironical consequence would be prevented by the Constitutional decisions above referred to, holding that national uniformity of the general maritime law, of which marine insurance is a part, is the Constitutional aim; and that therefore Congress *cannot* empower the states to defeat it (Auth. cit.). The act would be limited to its Constitutional objectives. These do not include the conferring on states of powers they were never held to possess before the *Southeastern* case, powers to substitute the diversity of State codes in the realm of maritime law for the constitutionally required uniformity "throughout the Union."

It does not seem, however, that the language of the *McCarran Act* requires any such result. The Act begins with a "Declaration of Policy" as follows:

> "1011. *Declaration of Policy.*
>
> "Congress declares that the *continued* regulation and taxation by the several states of the business of insurance is in the public interest, and that silence on the part of Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several states." (Our emphasis.)
>
> "1012. *Regulation by State Law;* * * *.
>
> "(a) The business of insurance, and every person engaged therein shall be subject to the laws of the several states which relate to the regulation or taxation of such business."
>
> 15 *United States Code*, Secs. 1011-1012.

The second section of the Act (on which, alone, Petitioners' argument travels) as to state power to regulate "the business of insurance" cannot be isolated from the first, for the second is an implementation of a policy expressed in the first, namely, that states shall "continue"

the regulation of "the business of insurance." That statutory intent cannot be applicable to the validity and effect of stipulations used in policies of marine insurance. In that field of marine insurance states never have regulated because they could not (Auth. cit.) and therefore they cannot "continue." For states, now, to start off exercising powers (which they never had "been held to possess") over marine insurance, would be inconsistent with the expressly declared policy which the Act was meant to implement, which is to "continue" what states had been doing in the exercise of powers they had been held to possess. The legislative history, above referred to, makes plain what Congress meant by the word "continue" in the statute, and the effect of this word as used in the declaration of policy upon the remainder of the Act, which was meant to implement that policy (*Ubi supra*).

To hold that the states under this Act can now make some new departure here (into the interpretation and effect of the terms of marine insurance policies) would be to say that Congress intended something that it took pains to say it did not intend.

This seems to be Petitioners' own understanding of the *McCarran Act*. In their brief to the Court of Appeals they say of the Act and the *Southeastern* decision: "This decision created a great deal of confusion * * *. It was as a consequence of the above decision that Congress in 1945 passed the *McCarran Act*, 15 U.S.C.A., Sec. 1011, heretofore quoted, placing the regulation of the insurance business in the states. *The legal effect of this Act is to leave the case at bar in the same position it would have been in had not the Supreme Court reversed itself in the Southeastern Underwriters* case, *Prudential Ins. Co.* v. *Benjamin*, 328 U. S. 408 (1946)," (App. Br. 16). *Knickerbocker Ice Co.* v. *Stewart*, for example, was decided in 1920

(253 U. S. 149), whereas *Southeastern* was not decided until 1944 (322 U. S. 533).

The foregoing admission by Petitioners themselves that the *McCarran Act*—in the light of its language, its explicit and well-known legislative history, and the authority construing it that they cite—is, precisely, a legislative act to undo the effect of the *Southeastern* case, seems well-nigh decisive. To undo *Southeastern* is not to undo *Knickerbocker*. To undo *Southeastern*, is certainly to deprive insurance of any protection it may have acquired thereby against state interference under the *commerce* clause. But, before *Southeastern*, when insurance had no such protection (since no insurance was regarded as commerce) the general maritime law which included as a characteristic feature the law of marine insurance was protected from state interference by the *admiralty* clause (Auth. cit.). When the *McCarran Act* took away from insurance the protection from state laws that *Southeastern* may have given it under the *commerce* clause, it took away a protection that the law of marine insurance never had. Notwithstanding insurance was not regarded as *commerce* after *Paul* v. *Virginia*, 8 Wall. (75 U. S.) 168, the constitutional protection of the effect of policies of marine insurance from diverse state laws under the *admiralty* clause had been adequate. It remains adequate.

The reason Petitioners so admit (App. Br. 16, *supra*) that the true nature of the *McCarran Act* is to restore the legal situation before *Southeastern* (in which States could *not* change the law of marine insurance) may be that they fail to recognize that the *Southeastern* case was decided under the *commerce* clause, only, as examination thereof discloses; whereas it is equally apparent that the *Knickerbocker* case was decided under the *admiralty* clause.

> "Difficulties attend every attempt to define the exact limits of admiralty jurisdiction, but *it cannot be made*

> *to depend upon the power of Congress to regulate commerce*, as conferred in the Constitution. They are entirely distinct things, having no necessary connection with one another, and are conferred in the Constitution by separate and distinct grants. *The Genesee Chief*, 12 How. 452." (Our emphasis.)
>
> *The Belfast*, 7 Wall. (U. S.) 624, 640.

One difference between these "entirely distinct things" is that *unlike the commerce clause*, the admiralty clause carries a requirement of national *uniformity*. That is the reason state-made laws are excluded. The same reason excludes any power in Congress to adopt or validate the diverse and inharmonious laws of the several states in the maritime field.

> "The necessary consequence would be destruction of the very uniformity with respect to maritime matters which the Constitution was designed to establish;"
>
> * * *
>
> "The distinction between the indicated situation created by the Constitution relative to maritime affairs and the one resulting from the mere grant of power to regulate commerce without more, should not be forgotten."
>
> *Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149, 158, 161.

There is a further vital difference. When only the commerce clause is involved it is said that Congress may validate state laws otherwise void for the reason that it does *not* thereby turn back to the states legislative powers given only to Congress. As to the situation when only the commerce clause is involved, it is held:

> "The Constitution does not provide that interstate commerce shall be free, but, by the grant of this exclusive power to regulate it, it was left free except as Congress might impose restraint." (Cit. auths.)
>
> * * *

"Nor can Congress transfer legislative powers to a state * * *.

* * *

"Congress did not use terms of permission to the state to act, but simply removed an impediment to the enforcement of the state laws with respect to imported packages in their original condition, created by the absence of specific utterance on its part. *It imparted no power to the state not then possessed,* but allowed imported property to fall at once upon arrival within the local jurisdiction. * * * This is not the case of a law enacted in the unauthorized exercise of a power confided to Congress, but *of a law which it was competent for the state to pass,* but which could not operate upon articles occupying a certain situation until the passage of the act of Congress." (Our emphasis.)

In re Rahrer, 140 U. S. 545.

(*Accord, Kentucky Whip & Collar Co.* v. *Illinois C.R. Co.,* 299 U. S. 334.)

This is the Constitutional theory invoked by the *McCarran Act* on the face of its declaration of policy (*Ubi supra*).

But this Constitutional theory which upholds Congressional validation of state laws, otherwise void, where only the commerce clause is involved, by avoiding surrender (without standards)[26] of Congressional legislative power to the states, is not available under the admiralty clause, in the maritime field. *Knickerbocker Ice Co.* v. *Stewart,* 253 U. S. 149. The *admiralty* clause is a different provision.

"Here, we are concerned with *a wholly* different constitutional provision—one which, *for the purpose of securing harmony and uniformity,* prescribes a set of rules, empowers Congress to legislate to *that* end, *and prohibits* material interference by the States. (Our emphasis.)

(*Ibid,* 253 U. S. 166.)

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[26] See *Field* v. *Clark,* 143 U. S. 649, cited in 253 U. S. 149, 164; and the cases in the line of *Field* v. *Clark,* such as *Panama Refining Co.* v. *Ryan,* 293 U. S. 388, 421, 430.

If the *McCarran Act* were understood as intended so to apply to contracts of *marine* insurance, its obvious constitutional infirmities in that application would at once arise under the *admiralty* clause. The obstacle to state action in the maritime field does not arise from the action, or inaction, of Congress. It arises from the *Constitution* itself.

> "The field was not left unoccupied; the Constitution itself adopted the rules concerning rights and liabilities applicable therein; and certainly these are not less paramount than they would have been if enacted by Congress. Unless this be true it is quite impossible to account for a multitude of adjudications by the admiralty courts. See *Workman* v. *New York City*, 179 U. S. 552, 557, *et seq.*
>
> "The distinction between the indicated situation created by the Constitution relative to maritime affairs and the one resulting from the mere grant of power to regulate commerce without more, should not be forgotten."
>
> (*Ibid*, 253 U. S. on 161.)

This Court's expressions concerning the *McCarran Act* itself confirm this analysis and affirm the correctness of Petitioners' admission—indeed, they doubtless account for the admission.

> "But, though Congress had no power to validate unconstitutional provisions of state laws, except in so far as the Constitution itself gives Congress the power to do this *by removing obstacles to state action arising from its own action or by consenting to such laws*, H. Rep. No. 143, 79th Cong., 1st Sess., p. 3, it clearly put the full weight of its power behind existing and future state legislation to restrain it from any attack *under the commerce clause* to whatever extent this may be done with the force of that power behind it, subject only to the exceptions expressly provided for." (Our emphasis.)
>
> *Prudential Ins. Co.* v. *Benjamin*, 328 U. S. 408, 430-431.

The Court also said:

> "Nor is it necessary to conclude that Congress, by enacting the McCarran Act, sought to validate every existing state regulation or tax. For in all that mass of legislation must have lain some provisions which may have been subject to serious question on the score of *other constitutional limitations in addition to commerce clause objections arising in the dormancy of Congress' power.* And we agree with Prudential that there can be no inference that Congress intended to circumvent constitutional limitations upon its own power." (Our emphasis.)
>
> *Prudential Ins. Co.* v. *Benjamin,* 328 U. S. 408, 430.

It seems impossible to contend that the McCarran Act was intended to sustain state action against attack under the *admiralty* clause. The *McCarran Act* was certainly not a response to the *Knickerbocker* case. It was a response to the *Southeastern* case, to protect state action that might be invalidated under the *commerce* clause. In view of the above-quoted admission of Petitioners' brief it does not seem that they feel able to dispute this. The *McCarran Act* was not aimed at *Knickerbocker,* which was the law before *Southeastern.* The *McCarran Act* was aimed at *Southeastern.* Its effect, Petitioners say, was to restore the legal situation as it existed before *Southeastern* (App. Br. 16). And the legal situation before *Southeastern* included *Knickerbocker,* and *Aetna,* and the other authorities above cited under the admiralty clause.

It seems plain that in the field of the general maritime law that includes marine insurance as a prominent and characteristic feature, Congress could not (if it would) restore the diversity of state control, when the central purpose of the admiralty clause was to give Congress the power in "all matters of admiralty and maritime jurisdiction" for the exact purpose of ending just that diversity (Auth. cit.). The point just made, however, is that Congress

never intended to exercise any such constitutionally forbidden powers by the *McCarran Act*. Reasons mentioned for so concluding are the language of the Act, its legislative history, the interpretation of it by the Supreme Court, and the admission of Petitioners as to its effect.

If more were needed, this construction seems almost mandatory in view of the cardinal rule that statutes will be construed to avoid not only the conclusion of unconstitutionality but even grave doubts thereof.

> "* * * A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score."
>
> *Panama R. R. Co.* v. *Johnson*, 264 U. S. 375, 390.

In applying that principle in the case just cited, this Court rejected a construction sought to be put upon a statute "that finds support in some of its words" because "if it be so construed, a grave question would arise respecting its constitutional validity." (*Ibid*, 264 U. S. 375, 390). The constitutional invalidity referred to, concerned some principles here involved. It was contended that an Act of Congress (the Jones Act) providing that an injured seaman "may, at his election, maintain an action for damages at law, with the right of trial by jury", was void, because it proposed to enable a seaman asserting a cause of action essentially maritime to withdraw it at his election from the reach of the maritime law and to have it determined according to different systems of law. This Court, agreeing that words of the Act supported that meaning, rejected that interpretation, because of the "grave doubt" of the constitutionality of any such enactment.

Needless to say, the case is a further recognition of the negation imposed by the admiralty clause on any power in Congress to reintroduce into the admiralty field the confusions of diverse laws, and the incapacity of Con-

gress, upon its judgment of policy, to make diverse state laws effective in this field, when the exact opposite is the policy and requirement of the Constitution.

The further point is that the court avoided condemning the statute, by interpreting it, so as to give it a constitutional meaning. It was not difficult to sustain the right of Congress to make negligence at the seaman's election an available, uniform, national rule, in seamen's cases. Further language of the act, bearing on its grant of a right "to an action for damages at law" presented more difficulty. But, in view of the constitutional rule of construction mentioned, this Court held this to mean no more than the "saving to suitors" clause of the other act of Congress, as already construed (for the same constitutional reasons) in *Chelentis* v. *Luckenbach S. S. Co., supra*—viz., to allow the seaman to sue in either a common law court or an admiralty court, but only under admiralty principles (*Ibid*).[27]

Thus, a state statute saying that the rights and remedy granted thereby shall be "exclusive," will nevertheless be construed not to exclude admiralty rights and remedies for maritime torts, notwithstanding these fell within the broad language of the Act; thus saving the statute in its non-maritime applications. *Messel* v. *Foundation Company*, 274 U. S. 427.

> "'When the validity of an act of Congress is drawn in question, and even if a serious doubt of constitu-

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[27] The courts of the states, have, accordingly, entertained suits under the act, but have applied admiralty principles, whether the suit came to the state court under the "saving to suitors" clause of the Judicial Code construed in the *Chelentis* case, or under the Jones Act, construed in the *Panama R.R.* case.

> "State courts, whether or not applying the Jones Act to actions arising from maritime torts, have usually attempted, although not always with complete success, to apply admiralty principles."
>
> *Garrett* v. *Moore-McCormack Co.*, 317 U. S. 239, 244.

> tionality is raised, it is a cardinal principle that this court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.' *Crowell* v. *Benson*, 285 U. S. 22, 62."
>
> *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 348.

The cases cited show the force of this "cardinal principle" to construe statutes to arrive at a constitutional meaning, even when their words themselves would support an unconstitutional meaning, or a meaning that raised grave doubt of constitutionality. It seems to us as to the *McCarran Act*, that language, legislative history, judicial construction, and the admissions of Petitioners, point to the constitutional construction, which confines the act to a rejection of the effect of the *Southeastern Underwriters* case under the commerce clause in order to enable the "continuance" of the regulation states had theretofore engaged in upon the general understanding that insurance was not within the *commerce* clause—not extending at all to a new departure, the force and effect of the terms of policies of maritime insurance, in the exercise of powers that states had never been "held to possess prior to the decision of the Supreme Court in the *Southeastern Underwriters Association* case." (Committee Report, *supra*). Actually, this seems to be conceded. For Petitioners say: "The legal effect of this Act is to leave the case at bar in the same position it would have been in had not the Supreme Court reversed itself in the *Southeastern Underwriters* case, 372 U. S. 533." (App. Br. 16). In that position, states cannot annul the effect of the terms of policies of marine insurance. (Auth. cit.)

It seems apparent that the facts at bar involve, even more urgently than the facts of the earlier cases, the considerations emphasized in holding it to be beyond the power of Congress to give blanket approval to state legislation over a broad field of the maritime law.

Here is a case in which Petitioners argue that Texas has power to say, for example, that wherever the contract is made, stipulations in marine insurance policies, against mortgaging the vessel, without the insurer's consent—provisions that are valid and enforceable against others—shall be wholly void if the policy ever becomes payable to inhabitants of Texas. (Petition pp. 6, and 7 note "7," citing Vernon's Texas Statutes 4890, and 5054.) Provisions against encumbering insured property go to moral risk. *Sun Ins. Office* v. *Scott*, 284 U. S. 177. Putting local pride and prejudice aside, it seems impossible to say that all the assureds who inhabit one state are less likely to burn a vessel for the insurance than the inhabitants of any of the other 47 states. At least, whether such local preferences should exist seems not to have been thought by the authors of the Constitution to be an appropriate matter for local judgment; but Petitioners claim application for it here, and say this local preference is now backed by the will of Congress! *Apart from the Constitutional requirement of uniformity* there is a further Constitutional objection to the assertion that the legislative power of Congress in this field includes a power to indorse blindly anything that local prejudice may inspire. In *Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149, the Court said:

> "Its power to legislate concerning rights and liabilities within the maritime jurisdiction and remedies for their enforcement, arises from the Constitution, as above indicated. The definite object of the grant was to commit direct control to the Federal Government; to relieve maritime commerce from unnecessary burdens and disadvantages incident to discordant legislation; and to establish, so far as practicable, harmonious and uniform rules applicable throughout every part of the Union.
>
> "Considering the fundamental purpose in view and the definite end for which such rules were accepted, we must conclude that in their characteristic features and essential international and interstate relations,

> the latter may not be repealed, amended or changed except by legislation which embodies *both* the will *and deliberate judgment* of Congress. The subject was intrusted to it to be dealt with according to its discretion—not for delegation to others. To say that because Congress could have enacted a compensation act applicable to maritime injuries, it could authorize the States to do so as they might desire, is false reasoning. *Moreover* such an authorization would inevitably destroy the harmony and uniformity which the Constitution not only contemplated but actually established—it would defeat the very purpose of the grant." (Our emphasis.) *Ibid*, 164.

Aside from its fatal factual inaccuracies (*vide supra*), Petitioners' presentation rests on what appear to be erroneous assumptions involved in statements which we quote therefrom:

First (Petition, p. 10): "Never before has an attempt been made to *extend the scope of general admiralty law* to include the regulation of the marine insurance business and thereby exclude state regulatory insurance statutes." (Our emphasis)

From the time of *De Lovio* v. *Boit*, *supra*, the effect of the terms of a policy of marine insurance has been held under our Constitution to be a matter of "admiralty and maritime jurisdiction" with express and special reference to: "The advantages resulting to the commerce and navigation of the United States, from a uniformity of rules and decisions in all maritime questions." (*De Lovio* v. *Boit*, 2 Gall. 398; F. C. No. 3, 776 at 443 (1815) *supra*.

From *The Lottawanna*, 21 Wall. 558, 575, through *Garrett* v. *Moore-McCormack Co.*, 317 U. S. 239, 244, N. 10 (1942) it has been held: "One thing, however, is unquestionable. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several States, as that would have defeated

the uniformity and consistency at which the Constitution aimed," etc.

This has nothing to do with other questions, on which the general maritime law is silent, such as whether states may "regulate" the amount of surplus of companies doing such business (*Winter, Marine Insurance*, 22) or whether they should be mutual or stock companies (*Idem*, 24) or whether a corporation should be admitted into the state at all to do such business, as in such cases as *Hooper* v. *California*, 155 U. S. 648 and *Nutting* v. *Massachusetts*, 183 U. S. 553, cited by Petitioners; or whether they shall conspire to restrain trade (The McCarran Act). These are not matters covered by the general maritime law. As the Court of Appeals remarked, "if more need be said, the *Hooper* case does not involve a conflict between state law and the law of admiralty," etc. (R. 283.) Appellants overlook, in citing Winter's handbook on "*Marine Insurance*" this passage which we quote therefrom (3rd. Ed. p. 20):

> "In the year 1756 the Earl of Mansfield ascended the bench as Lord Chief Justice of England, and for 32 years thereafter he molded and clarified English law. Of broad knowledge and keen intellect, he took insurance law as he found it, both in the English precedents and in the Continental codes, applied it in the light of commercial customs and usages to the cases presented to him, and developed a *body of law which is today the basis of both British and American practice.*" (Our emphasis)

Petitioners' above quoted statement, to the effect that the result of the Court of Appeals was one reached "never before" (Petition, p. 10) is the reverse of the truth. The fact is obvious from the decisions, including the decisions of this Court, that to substitute the diverse and clashing codes of the states for the substantive maritime law on which the marine insurance business rests and has rested for centuries in its "great field," would not only deprive

the parties to this and every outstanding policy of marine insurance of the benefits of the law with reference to which they contracted, but destroy the legal institutions on which a whole section of the economy is founded under our Constitution.

Second: Petitioners say (Petition, p. 10) that it is characteristic of admiralty law that "the regulation of the marine insurance business" (*sic.*) be left to "legislative bodies and not to the judicial branch of the government." What has already been said is, perhaps, an adequate commentary on that statement. We are here concerned with the effect of the terms of a policy of marine insurance, which is the nationally uniform admiralty or maritime law, pure and simple. (Auth. cit.) Nothing was further from the intent of Congress when the McCarran Act was passed than to affect it in any way. In any case, the "definite object" of the admiralty clause of the Federal Constitution:

> "* * * was to commit direct control to the Federal Government; to relieve maritime commerce from unnecessary burdens and disadvantages incident to discordant legislation; and to establish, so far as practicable, harmonious and uniform rules applicable throughout every part of the Union.
>
> "Considering the fundamental purpose in view and the definite end for which such rules were accepted, we must conclude that in their characteristic features and essential international and interstate relations, the latter may not be repealed, amended or changed except by legislation which embodies both the will and deliberate judgment of Congress. * * * To say that because Congress could have enacted * * * it could authorize the states to do so as they might desire, is false reasoning. *Moreover* such an authorization would inevitably destroy the harmony and uniformity which the Constitution not only contemplated but actually established —it would defeat the very purpose of the grant."
>
> *Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149, 164 (*supra*).

Third: Petitioners (p. 10) attribute the growth of the American marine insurance to state regulation! On the contrary, if American underwriters of vessels, which necessarily go from state to state in the performance of their ordinary and historic function, were now, after more than 150 years, to be confronted with 48 clashing systems of law as to the effect of their contracts, including 48 systems of the law of conflicts—"the unnecessary burdens and disadvantages of discordant legislation"—we should have lost precisely the "advantages resulting" from "a uniformity of rules and decisions" that were in view under the Constitutional grant, and that were emphasized in holding marine insurance to be a matter of "admiralty and maritime jurisdiction" under that grant. *De Lovio* v. *Boit*, 2 Gall. 398; Fed. Cas. No. 3,776, 443 (1815) *supra*. If Petitioners' above-quoted statement is meant to suggest that the effect of the terms of marine policies *has been* anything but the uniform, general maritime law, they are mistaken as to the fact. (Auth. cit.) If they mean to prophesy, in the teeth of experience, that diversity of law on *that* subject *would be* a good thing for the national community, they differ from the authors of the Constitution and from Holmes, J. and Story, J., to mention no others. (Auth. cit.) Indeed, we have been moved to treat these matters thus fully largely because of the catastrophe to maritime law, including the law of marine insurance, that would follow the abandonment of the advantage of our Federal Constitution, as Petitioners at this late date would suggest.

In view of what has been said, perhaps the inappositeness of Petitioners' further comment is sufficiently emphasized. Possibly we should add that there is no unconstitutional "discrimination" (Petition p. 11) in setting apart national matters for uniform, federal control, from local matters for diverse state control; that would make the Constitution itself unconstitutional. Nor did the Court of Appeals an-

nounce any different principle in *Cushing* v. *Maryland Casualty Co.*, 198 F. (2d) 536 (whether or not it there correctly applied it) for the principle it ther accepts is stated in the language of Mr. Justice Brand is' opinion deciding *Red Cross Line* v. *Atlantic Fruit Co.*, 264 U. S. 109,[28] and is as follows:

> "The right of a common law remedy do s not * * * include attempted changes by the state in the substantive admiralty law" etc. (*Red Cross Line* v. *Atlantic Fruit Co.*, *supra*, as quoted in *Cushing* v. *Maryland Casualty Co.*, 198 F. (2d) 536, on 538.)

The *Cushing* case is cited for that principle in the opinion below. (R. 283.) The principle is obviously necessary if substantive admiralty law is not to disappear in diverse state-made rules. "Controversy over cases in the Jensen line has not extended to this principle." *Garrett* v. *Moore-McCormack Co.*, 317 U. S. 239, 244 N. 10, and cas cit. (1942). And the validity and effect of the terms of a marine insurance policy is substantive admiralty law, if anything is. (*Insurance Co.* v. *Dunham*, 11 Wall. (78 U. S.) 1, 30-35 (1870), *supra*; *De Lovio* v. *Boit*, 2 Gall. 398; Fed. Cas. No. 3 776, at 443 (1815) *supra.*)

The corollary stated by the Court of Appeals in a former decision that: "When a cause of action in admiralty is asserted in a court of law its substance is unchanged" (*Panama Agencies* v. *Franco*, 111 F. (2d) 263, 266), was quoted with approval by this Court (as a summation of the effect of this Court's decisions in *Chelentis* v. *Luckenbach S.S. Co.*, 247 U. S. 372 and *Panama R. Co.* v. *Johnson*, 264 U. S. 375, there cited, and cited above), in *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85, 89, N. 5. A cause of action on

[28] The decision in that case was:

> "New York, therefore, had the power to confer upon its courts the authority to compel parties within their jurisdiction to specifically perform an agreement for arbitration, which is valid by the general maritime law," etc. (*Idem*, 124)

a marine insurance policy is a cause of action in admiralty, if there ever was one. (*DeLovio* v. *Boit*, *supra*; *Ins. Co.* v. *Dunham*, *supra*.) The Court of Appeals was on familiar ground when it held: "A cause of action on a marine insurance policy is a cause of action in admiralty and when it is asserted in a court of law its substance is unchanged."[29] (R. 282.)

The Petition makes no argument of ambiguity. It raises no question whatever as to the desirability of the rule of the general maritime law, that the terms of marine policies are enforced as they are written, and that their violation precludes recovery on the familiar principle that no man can recover on a contract he has broken. (*Home Ins. Co.* v. *Ciconett*, 129 F. (2d) 892, and auth. cit.)

This underwriter was in Chicago when this vessel sank in Oklahoma as the result of being "burned by fire" (Stipulation, R. 41) during the small hours of the night while apparently deserted and moored a little further off-shore than its usual berth. Contractual provisions of the policy, such as those here against pledge or sale of the insured interest, which underwriting experience has shown go to the moral hazard (Dep. White 10, 11), *Sun Insurance Office* v. *Scott*, 289 U. S. 177 (1931) are the marine underwriter's protection, and, as a practical matter, usually his only protection, against the assured's carelessness and fraud. They profoundly affect the nature of the risk. (See Plaintiffs' Exh. 2, R. 255.)

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[29] We are not sure that the Petition means to suggest any difference on this point between maritime contracts and maritime torts. The suggestion would be frivolous (Auth. cit.); and see *Jansson* v. *Swedish American Line*, 185 F. (2d) 212 (CA 1, 1950) and cas. cit.

III.

This was not a Texas contract.

As pointed out, this was a maritime contract, derived from and governed by the general maritime law.

If the uniform maritime law did not govern maritime contracts and state laws did, the first troublesome question would be—which state?

Petitioners stipulate they broke this contract (R. 40-43); they want to make it a Texas contract, arguing that under the law of Texas they were free to break it and still recover thereon.

But even if this were not a maritime contract governed by the general admiralty or maritime law, it still would not be a Texas contract.

We have heretofore pointed out that this insurance contract was made, completed and delivered in the State of Illinois.

The policy lists the following offices of the defendant—Chicago, New York, and California (R. 233, 252.) Certainly, the contract does not show an intent that it shall not be performed in Illinois where it was made, unless, under the Maritime law (which Petitioners say does not govern), its coverage of the vessel on navigable waters of the United States in many states may be called performance. Proofs of loss were to be furnished outside Texas (*vide supra;* see *Hartford Ind. Co.* v. *Delta Co.*, 292 U. S. 143, 149-150) and the warranty confining use to private pleasure purposes only, required performance wherever the vessel went. The vessel was in Oklahoma when the loss occurred.[30]

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[30] For the Oklahoma law, see *Brown* v. *Connecticut Fire Insurance Co.*, 153 Pac. 173 (Okla.)

The Texas law is that the place of performance is presumed to be the place of making when the policy does not fix performance in some other place. (*Fidelity Mutual Life Association* v. *Harris*, 94 Tex. 25, 35; 57 S. W. 635, 638:

> "The place of performance is to be regarded as the same as that at which the contract is made, unless it is to be gathered from the agreement that a different one was fixed." (*Ibid.*)

The law of Illinois is that a contract to be performed in several states is governed by the law of the place where it was made. *Oakes* v. *Chicago Fire Brick Co.*, 388 Ill. 474, 479; 58 N. E. 2d 460 (1945); *Pennsylvania Co.* v. *Fairchild*, 69 Ill. 260, 263 (1873).

The contract was negotiated, made, and delivered in the State of Illinois. (*Vide supra*)

The vessel which was the subject matter of the coverage was in many states. (R. 97, 106, 119, 120.) From Greenville, it navigated down the Mississippi River, up the Red River, and on Lake Texoma, which lies in two states. (R. 120.) Physically, most of the lake is in Oklahoma. (R. 120, 152.) It can be navigated to a limited extent in Texas. (R. 120, 152.) The regular berth of the vessel was in Oklahoma. (R. 97, 106, 119, 120.) Sometimes she crossed the Oklahoma-Texas line in navigating from her home berth at Burns Run resort in Oklahoma and returning thereto. (R. 120.) For the temporary purpose of repairs she was sometimes on the Texas side of these navigable waters of the United States. (R. 106, 144, 153.)

Originally owned by Marshall and Shuler, the vessel was then owned for a time by Wilburn Brothers, who Petitioners say, *all* lived in Denison, Texas, although they neglected really to prove that allegation as to all of them. But

when the loss occurred, and for some time theretofore, the entire legal and equitable title of the vessel was owned by a citizen of Oklahoma, an Oklahoma corporation not authorized to do business in Texas. (R. 43.)

After the loss, demands for payment were pressed upon H. H. Cleaveland Agency of Rock Island, Illinois, who forwarded these demands from Rock Island to defendant in Chicago. (Dep. Rossow Exs. 40, 41, 42, 43, 46-48). Proof of loss was sent by McKinney to H. H. Cleaveland Agency in Rock Island and also to defendant office in Chicago. (Dep. Rossow Ex. 49)

Petitioners' sole reliance is upon a Texas statute [32] which says that an insurance policy payable to an inhabitant of Texas shall be governed by Texas law. *Vernon's Texas Statutes*, Sec. 5054. Therefore, they contend, that no matter where the contract was made or where it was to be performed—regardless of the fact that the vessel was in Mississippi when the coverage attached, and, afterwards, in many states; no matter if the vessel was only rarely and transiently in Texas (or never in Texas); no matter if its regular berth was in Oklahoma and it was lost there while owned by a citizen of Oklahoma, the Court is permitted to regard only the circumstance that the policy was payable to the Wilburn brothers.[33] The power of the state under the Fourteenth Amendment to the Federal Constitution to make its laws applicable to a contract on the sole ground that one of the parties is a citizen of the state is denied by this Court. (*Hartford Indemnity Co.* v. *Delta Co.*, 292 U. S. 143; *Fidelity and Deposit Co.* v. *Tafoya*, 270 U. S. 426.)

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[32] Petitioners lack the temerity to quote this statute, but cite it in a footnote, Petition, p. 7, note 7.

[33] Actually, Petitioners failed to prove that all three of the Wilburn Brothers to whom the contract eventually ran were citizens or inhabitants of Texas when the coverage attached.

Incidentally, the Texas courts have not construed this statute as Petitioners wish to have this Court read it. In a recent Texas case, a citizen and inhabitant of Texas sued an Illinois insurance corporation licensed to do business in Texas on a policy of insurance issued in California pursuant to an application received in California. The Texas Court held:

> "[1] It will be observed that no part of the transaction leading up to the consummation of the original contract, or to the reinstatement thereof, or to the maturity of any right accruing thereunder, occurred or transpired within the State of Texas. Under the terms of the policy the insured was given the right to have the beneficiary changed at any time upon request, irrespective of the place of residence of such beneficiary. Clearly, the contract was not in fact made or entered into with reference to the laws of Texas or because of any Texas license or permit issued to appellant. Consequently, we do not think the provisions of Art. 5054 of Vernon's Tex. Civ. Stats. require or authorize the courts to hold that the contract sued upon was in legal contemplation made and entered into under and by virtue of the laws of Texas relating to insurance merely because appellant was in fact doing other business as an insurance company within this state, even though the proceeds from the policy were to become payable to some person whose residence might be within this state. After carefully considering the undisputed evidence in the light of the authorities cited by the respective parties, we have concluded that the validity, interpretation and obligations of the contract in suit must be determined and controlled by the laws of California and not by the laws of Texas, insofar as the laws of the former state may be shown to be different from the laws of the latter."
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> *Washington Nat. Ins. Co.* v. *Shaw*, 180 S. W. 2d 1003, 1004 (Tex. Civ. App. 1944).

It would thus appear that the Texas courts, in construing this statute, still treat it as a question of fact whether an insurance policy payable to an inhabitant of Texas is, or is

not, a Texas contract; and, since the literal test of the Act based on a Texas habitation by the payee is rejected, the Texas courts read the statute according to the doctrine of *Fidelity Mutual Life Association* v. *Harris*, 94 Tex. 25, 57 S. W. 635, 638, *supra*, and *Hartford Ind. Co.* v. *Delta Co.*, 292 U. S. 143, *supra*. See accord: *Metropolitan Life Ins. Co.* v. *Greene*, 93 S. W. 2d 1241, 1245 (Tex. Civ. App.).

Accordingly, even if the *McCarran Act* were applied, and were valid in that application, the question "which state?" that would then arise could not be answered in favor of the law of Texas to govern this Illinois transaction, without transgressing constitutional restraints imposed by the Fourteenth Amendment on the power of states to give their laws extra-territorial effect (nor without overriding the construction Texas courts have given this Texas statute, a construction which begins by tacitly rejecting the unconstitutional test of a Texas habitation by the payee as the circumstance to determine what law shall govern an insurance contract).

Beyond all these considerations is the fact that the result for which Petitioners contend is not within the intent of the *McCarran Act*. By that Act Congress had no intent to empower states to give their laws extra-territorial effect contrary to the ideas entertained by Congress of the restraints imposed by the Fourteenth Amendment. The report of the committee on the *McCarran Act* seems perfectly clear:

> "Briefly, your committee is of the opinion that we should provide for the continued (sic) regulation and taxation of insurance by the states, subject always, however, to the limitations set out in the controlling decisions of the United States Supreme Court, as, for instance, in *Allgeyer* v. *Louisiana*, 165 U. S. 578; *St. Louis Cotton Compress Co.* v. *Arkansas*, 260 U. S. 364; and, *Connecticut General Insurance Co.* v. *Johnson*,

> 303 U. S. 77, which hold, *inter alia*, that a state does not have power to tax contracts of insurance or reinsurance entered into outside its jurisdiction by individuals or corporations residenced or domiciled therein, covering risks within the state, or to regulate such transactions in any way." (H. R. 143, *U. S. Code Congressional Service*, 79th Cong. 1st Sess.; pps. 671, 672.)

When it is remembered that this contract was made in Illinois, that this risk did not have Texas *situs*, and that when the loss occurred the entire legal and equitable title to the property was owned by an Oklahoma corporation, it would be to flout the intent of the *McCarran Act* all over again to say that its intent is to subject this transaction to Texas law.

Obviously, Congress considered that it would be, also, to flout the Constitution. We agree; and so contend.

IV.

Petitioners' many breaches barred recovery.

Petitioners stipulated that they violated this contract. They seek to find a law that will permit them to violate the contract and still recover on it.

The general Maritime Law would not allow that; there is no such argument. The rule is stated by the Court of Appeals with ample citation of authority (R. 280) and Petitioners do not deny it here.

In *Fidelity-Phenix Insurance Co.* v. *Chicago Title and Trust Co.*, 12 F. 2d 573, 574 (CCA 7), for example, the Court said:

> "The principal defense is a breach of the warranty that the steamer was a passenger steamer. In the view we take of this question it will not be necessary to notice other contentions. The rule is that a breach of an express warranty in a policy of insurance bars a

recovery whether it caused the injury or not. Arnould on Marine Insurance and Average (10th Ed.) vol. 2 §§ 632, 633; 38 Corpus Juris, p. 1064."

The Court said further on the same page:

"'The terms of the policy constitute the measure of the insurer's liability, and, in order to recover, the assured must show himself within those terms. * * * The compliance of the assured with the terms of the contract is a condition precedent to the right of recovery.' *Imperial Fire Ins. Co.* v. *County of Coos,* 151 U. S. 452, 14 S. Ct. 379, 38 L. Ed. 231; *McLoon* v. *Commercial Mutual Ins. Co.,* 100 Mass. 472, 97 Am. Dec. 116, 1 Am. Rep. 129."

(See *accord, Home Insurance Co.* v. *Ciconett,* 179 F. (2d) 892, quoted by the Court of Appeals at R. 280-281, and auth. cit.)

This rule, as stated in *Imperial Fire Ins. Co.* v. *Coos County,* 151 U. S. 452, cited in the foregoing maritime cases (if not actually borrowed from the maritime law by the common law) is also the common law of Texas (*Fidelity Mutual Life Association* v. *Harris,* 94 Texas 25, 57 S. W. 635, 637; *Lozano* v. *Palatine Ins. Co.,* 78 Fed. 278 (CA 5, 1896)) and of Illinois (*Norwaysz* v. *Thuringia Ins. Co.,* 204 Ill. 334, 341, 346; 68 N. E. 551) as well as the general Maritime Law. (*Vide supra.*)

In *Imperial Fire Insurance Co.* v. *Coos County,* 151 U. S. 452, violation of the policy provision there in question did not cause the loss; and the provision did not describe itself as a warranty, that word not being used, but it was an express provision and was treated as a warranty,[34] compliance with which was a condition of recovery, for it expressly stated that if it was not complied with, the policy

[34] "No particular form of words is necessary to constitute an express warranty. It may be in any form of words from which an intent to warrant may be inferred." Arnould on Marine Insurance, 1939, 12th Ed., Sec. 630.

should be void. (Compare certain like provisions of this policy, *supra.*)

The lower court had permitted recovery because the violation did not increase the risk—and this Court reversed that, holding, precisely, that the provision had to be complied with as a matter of contract, whether it increased the risk or not. This Court said on page 464:

> "The specific thing described in the last condition as avoiding the policy, if done without consent, was one which the insurer had a right, in its own judgment, to make a material element of the contract, and, being assented to by the assured, it did not rest in the opinion of other parties, court or jury, to say that it was immaterial, unless it actually increased the risk."

This Court said further (151 U. S. on 462):

> "Contracts of insurance are contracts of indemnity upon the terms and conditions specified in the policy or policies, embodying the agreement of the parties. For a comparatively small consideration the insurer undertakes to guaranty the insured against loss or damage, upon the terms and conditions agreed upon, and upon no other, and when called upon to pay, in case of loss, the insurer, therefore, may justly insist upon the fulfillment of these terms. If the insured cannot bring himself within the conditions of the policy, he is not entitled to recover for the loss. The terms of the policy constitute the measure of the insurer's liability, and in order to recover, the assured must show himself within those terms; and if it appears that the contract has been terminated by the violation on the part of the assured, of its conditions, then there can be no right of recovery. The compliance of the assured with the terms of the contract is a condition precedent to the right of recovery."

The law of Illinois (Sec. 766 *Ill. Rev. Stat.* 1949 ed.; *Ill. Ins. Code* (1937) Sec. 154) where this contract was made, leaves it to be governed by the maritime law:

> "No misrepresentation or false warranty made by the insured or in his behalf in the negotiation for a

> policy of insurance or breach of a condition of such policy shall defeat or avoid the policy or prevent its attaching unless such misrepresentation, false warranty or condition shall have been stated in the policy or endorsement or rider attached thereto, or in the written application therefor, of which a copy is attached to or endorsed on the policy, and made a part thereof. No such misrepresentation or false warranty shall defeat or avoid the policy unless it shall have been made with actual intent to deceive or materially affects either the acceptance of the risk or the hazard assumed by the company. *This section shall not apply to policies of marine or transportation insurance.* (Our emphasis.)

It is for this reason that the Petition is so silent concerning any conflict whatever between the general Maritime Law and the law of Illinois. (*Vide supra*, Point I) [35]

The Court of Appeals held the maritime law governed this maritime contract and said "the state law is inapplicable whatever it may be and we need not and do not decide whether, as appellee vigorously and persuasively insists, the Texas statutes as construed by the Texas courts have no application to the present situation." (R. 283)

Even if there were no such thing as a maritime clause in the Constitution, federal reasons of due process under the XIVth Amendment forbid any application of Texas law to this situation, arising out of a contract made in Illinois.

However incidental it may be for present purposes it is also true that in construing the Texas statutes relied on by Petitioners, the Texas courts themselves here observe the prohibition of the XIVth Amendment against extra-territorial effect of this state legislation (*Washington National Ins. Co.* v. *Shaw*, 180 S. W. (2d) 1003, 1004

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[35] For the Illinois common law, see *Norwaysz* v. *Thuringia Insurance Company*, 204 Ill. 334, 341, 346; 68 N.E. 551 (citing and following *Imperial Fire Insurance Co.* v. *Coos County*, 151 U. S. 452).

(Tex. Civ. App. 1944) *supra; Fidelity Mutual Life Association* v. *Harris*, 94 Texas 25, 57 S. W. 635; *Metropolitan Life Ins. Co.* v. *Greene*, 93 S. W. (2d) 1241, 1245 (Tex. Civ. App.,)—and that even as to a Texas contract, the Texas courts would enforce, just as they are written, at least some of the provisions that Petitioners stipulate they violated. (*Vide supra.*) As the Court of Appeals remarked, "one breach is sufficient." (R. 281) Petitioners point to no Texas statute outlawing stipulations against sale of the assured interest, or against commercial use,[36] or against false representations or concealments.[37]

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[36] Petitioners made an argument to the Court of Appeals of waiver of the condition against commercial use under the admiralty law and the law of Texas (R. 279), which, notwithstanding it was not in the case on the pleadings (*Vide supra*), was decided adversely to them by that Court (R. 281). The Petition brings forward no question of the correctness of that ruling.

[37] See *Cohen, Friedlander & Martin Co.* v. *Mass. Mut. Life*, 166 F. (2d) 63 (CA 6, 1948); cert. den. 334 U. S. 820; *Btesh et al.* v. *Royal Ins. Co., Ltd.*, 40 F. (2d) 659 (S. D. N. Y.); aff'd. 49 F. (2d) 720 (1931); *Hargrove* v. *Ins. Co.*, 125 F. (2d) 225 (CA 10, 1942); *Claflin* v *Insurance Co.*, 110 U. S. 81.

CONCLUSION

It is submitted that the Petition should be denied; for

(1). It wholly fails even to suggest any conflict between the general maritime law, and the law of Illinois (which would govern this contract if there were no such thing as the general maritime law, and which equally forbids recovery in the teeth of the many stipulated violations of the plain terms of the contract);

(2). The general maritime law forbids recovery under such circumstances and this was a maritime contract governed by that law;

(3). The law of Oklahoma, where the vessel was lost, and concerning which the Petition is also silent would also forbid recovery;

(4). The sole question argued by the Petition, of alleged conflict between the general maritime law and the law of Texas, is moot. But even the law of Texas would not permit recovery here in view of all Petitioners' admitted breaches; nor would it even treat this as a Texas contract.

Respectfully submitted,

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